S. HRG. 99-779

NOMINATION

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

GEORGE R. SALEM, OF VIRGINIA, TO BE SOLICITOR, U.S. DEPARTMENT OF LABOR

JUNE 16, 1986

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE

63-114 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S541-70

COMMITTEE ON LABOR AND HUMAN RESOURCES

ORRIN G. HATCH, Utah, *Chairman*

ROBERT T. STAFFORD, Vermont
DAN QUAYLE, Indiana
DON NICKLES, Oklahoma
PAULA HAWKINS, Florida
STROM THURMOND, South Carolina
LOWELL P. WEICKER, JR., Connecticut
MALCOLM WALLOP, Wyoming
CHARLES E. GRASSLEY, Iowa

EDWARD M. KENNEDY, Massachusetts
CLAIBORNE PELL, Rhode Island
HOWARD M. METZENBAUM, Ohio
SPARK M. MATSUNAGA, Hawaii
CHRISTOPHER J. DODD, Connecticut
PAUL SIMON, Illinois
JOHN F. KERRY, Massachusetts

HAYDEN G. BRYAN, *Staff Director*
THOMAS M. ROLLINS, *Minority Staff Director/Chief Counsel*

NOMINATION

MONDAY, JUNE 16, 1986

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman) presiding.

Present: Senators Hatch, Metzenbaum, and Grassley.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. The committee will come to order.

I would like to express at the outset that Senator Thurmond would have been here, except that he has had a very important request from his young son, who is playing in a soccer championship game today, to come and see that game. Strom is a wonderful father, and so he stayed in his home State to be able to see his son play soccer this morning. So, we excuse him, and we will put his statement in the record immediately following Senator Metzenbaum's this morning.

Today's hearing is on the nomination of George Richard Salem to be Secretary of Labor—excuse me—Solicitor of Labor. I promoted you pretty well there, Mr. Salem.

Mr. SALEM. I am very flattered, Senator. [Laughter.]

The CHAIRMAN. Mr. Salem is currently the Acting Solicitor of Labor, a position that he has held since Frank Lilly resigned last December. And I have to admit that I take great pride in Mr. Salem's nomination. Not only is he extremely well-qualified for this important position, but for those of us who know George personally, his life is in many respects the personification of the American dream.

The son of an immigrant to this country, Mr. Salem attended Emory University, where he received both a baccalaureate and law degree. He went on to earn a master's in labor law from Georgetown University, and before joining the Department of Labor, Mr. Salem was a partner in the law firm of Thompson, Mann & Hutson.

I was asked to hold today's hearing by my good friend and colleague, Senator Metzenbaum. The Senator indicated in a letter to me that he wished to address Mr. Salem's handling of partial waivers granted to the members of the ERISA Advisory Council's Task Force on Terminations, and the fact that the meetings of the task force were held in private.

Consequently, today's hearing is being held to accommodate Senator Metzenbaum's request.

The Senator also asked that I utilize my authority as chairman of the committee to obtain copies of the personal financial statements submitted by the members of the task force at the request of the Department of Labor. I have obtained this information for Senator Metzenbaum but with the understanding that it will not be released to the public during the confirmation process in order to protect the privacy rights of the members of the task force.

Finally, Senator Metzenbaum has asked that certain members of the task force be present today in case he has questions for them. That request has also been met. I know that former Congressman Erlenborn had to postpone an important trip to be here today; and John, I just want to tell you that we appreciate your cooperation and tolerance.

Now, at this point, I would like to place in the record the letters I have received concerning Mr. Salem's nomination. Letters in support of his nomination are from Congresswoman Mary Rose Oaker, the Chamber of Commerce, and the National Association of Manufacturers. The AFL–CIO has also written, indicating that they believe Mr. Salem is well-qualified to be Solicitor, and that it would be appropriate for the Senate to confirm his nomination.

After reviewing the documents that have been submitted to the committee, I am convinced that today's record will demonstrate that Mr. Salem acted in a manner consistent with both the letter and the spirit of the law.

I am also confident that if the members of the committee judge Mr. Salem on the basis of his record and qualifications, his nomination will be unanimously approved when it comes to the Senate floor.

[The prepared statements of Senators Thurmond and Grassley and the letters referred to follow:].

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE REFERENCE NOMINATION OF GEORGE R. SALEM AS SOLICITOR OF THE DEPARTMENT OF LABOR, SD-430, JUNE 16, 10:00 A.M.

MR. PRESIDENT:

It is my pleasure to introduce to my distinguished colleagues, Mr. George R. Salem, who has been nominated to serve as Solicitor of the Department of Labor. I have known Mr. Salem for several years. In my judgment, he is eminently qualified to serve in this important position.

Mr. Salem was born in Jacksonville, Florida. He received his undergraduate degree from Emory University in 1975. In 1977, he graduated from the Emory University School of Law. Upon graduation, he became associated with the Atlanta office of the Thompson, Mann, and Hutson law firm. This firm is based in Greenville, South Carolina. The Senior Partner of that firm, Mr. Robert T. Thompson, has been my good friend for many years. This law firm has an excellent National reputation and is known for its highly competent lawyers who produce quality legal work. Because I am personally familiar with the professional competency of Mr. Salem, I have no reservations in supporting this nomination.

In 1980, Mr. Salem moved to the Washington office of Thompson, Mann, and Hutson. In 1982, he was made a partner of that firm. He received a Masters degree in labor law from Georgetown University in 1984. From April 1985 to December 1985, Mr. Salem served as Deputy Solicitor for the Department of Labor. Since December 9, 1985, he has served as Acting Solicitor of Labor. In this position, he has been responsible for the enforcement of more than 130 Federal laws affecting workers in the United States, including

laws governing safety and health in the workplace, employment discrimination, minimum wage and overtime pay guarantees, and unemployment insurance.

Throughout his career, he has demonstrated his personal integrity and intelligence. During his service as Acting Solicitor, Mr. Salem has dealt with many difficult and complex issues. He has shown a strong commitment to his duty of fair and impartial enforcement of Federal labor laws. I am confident that he will continue to exhibit his devotion to fairness when confirmed.

Mr. Salem is 32 years old. He is a member of the District of Columbia, Florida, and Georgia Bars. He and his wife, Rhonda, and their two children reside in Springfield, Virginia.

Based on my observations of Mr. Salem's character, his academic credentials, and his professional ability, I strongly urge his confirmation.

"END"

STATEMENT OF

SENATOR CHARLES E. GRASSLEY

ON THE NOMINATION OF GEORGE R. SALEM

TO BE SOLICITOR, DEPARTMENT OF LABOR

MR. CHAIRMAN, THE SOLICITOR OF THE DEPARTMENT OF LABOR HAS RESPONSIBILITY FOR ALL THE LEGAL ACTIVITIES OF THE DEPARTMENT. HE IS ALSO RESPONSIBLE FOR THE DEPARTMENT'S LEGISLATIVE PROGRAM AND SERVES AS LEGAL ADVISOR TO THE SECRETARY OF LABOR AND OTHER OFFICIALS OF THE DEPARTMENT OF LABOR. HIS LEGAL RESPONSIBILITIES INCLUDE THE DEPARTMENT'S LITIGATION EFFORTS PERTAINING TO THE MANY STATUTES ADMINISTERED BY THE DEPARTMENT OF LABOR, INCLUDING THE FAIR LABOR STANDARDS ACT, THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, AND OTHER IMPORTANT STATUTES.

I AM LOOKING FORWARD TO EXAMINING THE RECORD OF THIS HEARING, IN WHICH THE COMMITTEE WILL EXAMINE MR. SALEM'S FITNESS TO HOLD THE OFFICE OF SOLICITOR OF LABOR. SINCE MR. SALEM HAS BEEN ACTING SOLICITOR SINCE LAST DECEMBER, THE COMMITTEE SHOULD HAVE THE ADVANTAGE OF BEING ABLE TO EXAMINE HIS PERFORMANCE IN THE POSITION TO WHICH HE HAS BEEN NOMINATED.

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

JUN 16 1986

Honorable John F. Kerry
United States Senate
Washington, D.C. 20510

Dear Senator Kerry:

Senator Metzenbaum has brought to my attention your interest in the question of application of the Davis-Bacon provisions of the Housing and Community Development Act of 1974 to Urban Development Action Grants (UDAG) and Community Development Block Grants (CDBG).

As you may be aware, the Deputy Under Secretary for Employment Standards issued a ruling on July 31, 1985 that use of UDAG or CDBG funds for activities integrally or proximately related to construction, such as for purchase of the land upon which construction would take place, required application of Davis-Bacon to the construction. The Department's Wage Appeals Board subsequently held in Muskogee Shopping Mall, WAB No. 85-26 (January 21, 1986), that Davis-Bacon applied where UDAG funds were utilized for purchase and clearing of land for a shopping mall.

The Department of Housing and Urban Development (HUD) has requested reconsideration of the Deputy Under Secretary's ruling. In this connection, we are currently working with HUD officials to clarify application of the ruling both UDAG and CDBG grants.

We are hopeful that the matter will be satisfactorily resolved. In the meantime I will be glad to keep you advised of any further developments.

Sincerely,

George R. Salem
Deputy Solicitor

MARY ROSE OAKAR
20TH DISTRICT, OHIO

WASHINGTON OFFICE
2436 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5871

DISTRICT OFFICE
523 FEDERAL COURT BUILDING
215 SUPERIOR AVENUE
CLEVELAND, OH 44114-1281
(216) 522-4927

Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEES
BANKING, FINANCE AND URBAN AFFAIRS
POST OFFICE AND CIVIL SERVICE
CHAIR, SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS
SELECT COMMITTEE ON AGING
CHAIR, TASK FORCE ON SOCIAL SECURITY AND WOMEN
COMMITTEE ON HOUSE ADMINISTRATION
CHAIR, TASK FORCE ON LIBRARIES AND MEMORIALS
SECRETARY, DEMOCRATIC CAUCUS
WHIP AT LARGE

March 25, 1986

The Honorable Orrin Hatch
United States Senate
135 Senate Russell Building
Washington, D.C. 20510

Dear Senator Hatch:

This letter is submitted in support of the candidacy of George R. Salem to serve as Solicitor of Labor.

Mr. Salem is well-known and well-respected as an experienced and successful attorney with the rare combination of tremendous ability, high integrity, and unusual ability to engender the respect of his colleagues and staff. In my judgement, Mr. Salem is eminently qualified for the position and would continue to be a asset to the Department of Labor.

I have known Mr. Salem for some time as an outstanding ethnic leader and citizen. As Acting Solicitor he has demonstrated exceptional competence, and has managed the Solicitor's office in a way which best fulfills the Labor Department's mandate to serve the needs of working men and women.

I am proud to know George Salem. His demonstrated leadership, upstanding moral character and high level of community service have earned him the respect and high regard of all constituencies which are served by the Department of Labor.

I recommend Mr. Salem for the position of Solicitor, Department of Labor, with enthusiam and I urge your Committee's swift confirmation.

If I can be of any assistance to you during Mr. Salem's confirmation process, please do not hesitate to contact me.

Sincerely,

Mary Rose Oakar
Member of Congress

MRO/emw

National Association
of Manufacturers

ALEXANDER B. TROWBRIDGE
President

June 12, 1986

The Honorable Orrin G. Hatch
United States Senate
Chairman, Committee on Labor and
Human Resources
Room 135, Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

It is my understanding that Mr. George R. Salem's nomination for the position of Solicitor, U.S. Department of Labor, is currently under consideration by the Senate Committee on Labor and Human Resources. The National Association of Manufacturers would like to take this opportunity to express our unqualified support for Mr. Salem's candidacy and to urge the Committee to approve his nomination.

Mr. Salem has worked as Acting Solicitor of Labor since December 1985, and held the position of Deputy Solicitor for National Operations from April, 1985. He has necessarily gained in those positions an in-depth, thorough knowledge of the policy and legal issues that will confront the Department of Labor in the next several years. This experience is backed by seven years specialized private practice in the area of labor and employment law generally.

Moreover, Mr. Salem has, throughout his professional career, advanced a balanced approach to the labor relations field. He has consistently recognized that both labor and management have legitimate needs which should be addressed, within the confines of the law, whenever possible.

The National Association of Manufacturers believes Mr. Salem would serve with distinction and honor as the next Solicitor of Labor. We would be pleased to provide any additional information you or any other member of the Committee may request concerning Mr. Salem's qualifications and appreciate your consideration of this letter of endorsement.

Sincerely,

A. B. Trowbridge

1331 Pennsylvania Ave. NW
Suite 1500 - North Lobby
Washington, D.C. 20004-1703
(202) 637-3012

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

EXECUTIVE COUNCIL

LANE KIRKLAND PRESIDENT THOMAS R. DONAHUE SECRETARY-TREASURER

Thomas W. Gleason
Albert Shanker
Angelo Fosco
Alvin E. Heads
John DeConcini
John J. Sweeney
Barbara Hutchinson
Gerald W. McEntee
Patrick J. Campbell
Lynn R. Williams
Robert A. Georgine
Frederick O'Neal
Sol C. Chaikin
Charles H. Pillard
William W. Winpisinger
Wayne E. Glenn
Frank Drozak
Richard L. Kilroy
William H. Bywater
Owen Bieber
Morton Bahr
Max Stone
Murray H. Finley
Edward T. Hanley
Kenneth T. Blaylock
William H. Wynn
Joyce D. Miller
James E. Mattfield
Vincent R. Sombrotto
Marvin J. Boede
John T. Joyce
Larry L. Dugan, Jr.
Gene Upshaw

June 12, 1986

The Honorable Orrin Hatch, Chairman
Senate Committee on Labor and Human Resources
United States Senate
Washington, D.C.

Dear Senator Hatch:

This is in response to your letter of June 12, 1986 seeking the views of the AFL-CIO with respect to the nomination of George Salem to be Solicitor of Labor.

The AFL-CIO believes that Secretary Brock should be allowed to fill the top positions in the Department with individuals who have his confidence provided, of course, such individuals are well-qualified to serve in the positions for which they are nominated. Based on our investigation and our experience in working with Mr. Salem as Acting Solicitor, we are satisfied that Mr. Salem meets that test. The AFL-CIO, therefore, does not oppose the nomination and we believe it would be appropriate for the Senate to confirm Mr. Salem's nomination.

Sincerely,

Robert M. McGlotten

Robert McGlotten, Director
Department of Legislation

cc: All Members Senate Labor and Human Resources Committee

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RICHARD L. LESHER
PRESIDENT

1615 H STREET N.W.
WASHINGTON D.C. 20062
202/463-5300

June 13, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Orrin:

On behalf of the U.S. Chamber of Commerce, I strongly support the nomination of George Salem as Solicitor of Labor at the U.S. Department of Labor.

I understand the Committee on Labor and Human Resources soon will consider Mr. Salem's nomination. I respectfully urge the Committee to send to the Senate floor Mr. Salem's nomination for confirmation.

Mr. Salem is an outstanding attorney with excellent qualifications for the important position of Solicitor. He has distinguished himself as Deputy Solicitor of Labor and as Acting Solicitor of Labor and proven that he can handle with distinction the responsibilities associated with this promotion. My staff has worked with Mr. Salem in both his current position and while he was in private practice, and they assure me that he is an attorney of the highest caliber with a great deal of integrity, professionalism and legal skills.

The U.S. Chamber strongly endorses the nomination of George Salem as Solicitor of Labor.

Sincerely,

Richard L. Lesher

CHARLES E. BENNETT
MEMBER
3D DISTRICT, FLORIDA

ARMED SERVICES COMMITTEE
CHAIRMAN OF SEAPOWER SUBCOMMITTEE
MEMBER OF RESEARCH AND
PERSONNEL SUBCOMMITTEES

MERCHANT MARINE AND FISHERIES
COMMITTEE

HOUSE DEMOCRATIC STEERING AND
POLICY COMMITTEE

CHAIRMAN OF FLORIDA CONGRESSIONAL
DELEGATION

Congress of the United States
House of Representatives
Washington, DC 20515

W. DEKLE DAY
ADMINISTRATIVE ASSISTANT

JODY H. MOONEY
LEGISLATIVE ASSISTANT

SHARON H. SIEGEL
BARBARA L. FETHEROLF
DARLA E. SMALLWOOD
MARIA G. PAPPANO
RUSSELL W. HOUSTON
ETHEL M. SCHISSELL
MARSHA L. MCCORMICK
STAFF

WASHINGTON OFFICE
2107 RAYBURN BUILDING
WASHINGTON, DC 20515
TELEPHONE 202-225-2501

JOHN W. POLLARD, JR.
BRENDA C. DONALDSON
DONNA M. WELDON

JACKSONVILLE OFFICE
314 PALMETTO STREET
JACKSONVILLE, FL 32202
TELEPHONE 904-791-2587

June 13, 1986

The Honorable Orrin G. Hatch
United States Senate
Chairman, Committee on Labor and Human
Relations
135 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

I recently learned that Mr. George R. Salem, a native of Jacksonville, Florida, has been nominated by President Reagan for the position of Solicitor of Labor and that his nomination is currently under consideration by the Senate Committee on Labor and Human Relations. It gives me great pleasure to strongly endorse Mr. Salem's nomination and I would like to express the hope that the Committee will approve his nomination in the very near future.

I believe Mr. Salem's qualifications for the position of Solicitor are self-evident from his record. He joined the Department of Labor in April 1985 as Deputy Solicitor for National Operations and, in December 1985, was entrusted by Secretary of Labor Brock with the responsibilities of Solicitor. This on-the-job training is backed by over seven years of the private practice of law, exclusively in the labor and general employment relations areas.

Mr. Salem's reputation as an extremely competent lawyer with a strong sense of integrity, equity and fair play is beyond question. These are qualities which will serve him well as Solicitor of Labor.

I want to thank you, and the Committee, for this opportunity to endorse Mr. Salem's nomination. Should I be able to provide any further information concerning his qualifications and background, do not hesitate to call.

With kindest regards, I am

Sincerely,

Charles E. Bennett

CEB:ss

The CHAIRMAN. With that, I will turn to Senator Metzenbaum.

Senator METZENBAUM. Good morning, Mr. Salem.

Mr. SALEM. Good morning, Senator Metzenbaum.

Senator METZENBAUM. The first question I have is on behalf of Senator Kerry, and I will ask that question as a courtesy to him.

As you know, the Department of Labor and the Department of Housing and Urban Development have for some time been involved in a jurisdictional controversy——

The CHAIRMAN. Howard, are you starting questions, or are you just making a statement?

Senator METZENBAUM. I am starting questions.

The CHAIRMAN. Oh, well, let me go first then—would you mind?

Senator METZENBAUM. No, I do not mind. I do not believe that I have any desire to make an opening statement.

The CHAIRMAN. OK. Well, just let me ask a few questions.

Senator METZENBAUM. Certainly. Please do.

The CHAIRMAN. I will try and be short, and we will go from there.

Mr. Salem, I do not know if you have a statement, but could you just summarize for us what you feel?

STATEMENT OF GEORGE R. SALEM, OF SPRINGFIELD, VA., NOMINATED TO BE SOLICITOR OF LABOR, U.S. DEPARTMENT OF LABOR

Mr. SALEM. Certainly, in less than a minute, Senator.

First of all, I would like to thank you for your kind introductory remarks, Mr. Chairman. I am deeply honored by the confidence which President Reagan and Secretary Brock have shown in me through their nomination of me for the challenging position of Solicitor of Labor, and I welcome the opportunity to appear before you today as you consider that nomination.

I came to the Department as Deputy Solicitor for National Operations on April 8, 1985. On December 9, Francis X. Lilly resigned as Solicitor to return to private life, and Secretary of Labor William E. Brock assigned the duties of the Solicitor to me. I have been performing these duties since that time, and it has been a challenging, rewarding, and exciting period.

Mr. Chairman, I would like to take this public opportunity to express my appreciation to my wife, Rhonda, and our two children, James and Jihan, for their support during this past year. They have been a constant source of strength, inspiration, and understanding during my tenure of Government service. Their contributions to my presence here today are only exceeded by my appreciation.

I would also like to express my sincerest appreciation to the legal staff in the Office of the Solicitor who daily manifest the excellence in professionalism and integrity which the legal profession generally should strive to emulate.

Mr. Chairman, Secretary Brock has brought to the Department of Labor strong and purposeful leadership. He has instilled in his team an ambitious vision and agenda for enhancing the lives of American working men and women. His enthusiasm and zeal are contagious, and under this leadership the Department of Labor is a

vital and exciting agency charged with fulfilling the mission for which it was created.

Secretary Brock challenges all of us at the Department to exert our best efforts to serve this Nation's workers. He has imparted on all of us his priorities: That every American has an inherent right to a job; that there is dignity in work; that work is opportunity, and opportunity must be equal for all.

I agree wholeheartedly with the Secretary's priorities. I am deeply honored and exceedingly proud to be part of his team.

With the committee's permission and yours, Mr. Chairman, I would like to submit the remainder of my statement for the record, and I am available now to answer your questions.

[The prepared statement and biographical sketch of Mr. Salem follow:]

STATEMENT OF GEORGE R. SALEM,
NOMINEE FOR THE POSITION OF SOLICITOR OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
TO THE COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

June 16, 1986

Mr. Chairman and Members of the Committee:

I would at the outset like to thank Senator Thurmond for his introduction of me and for his kind words. I know his duties as President Pro Tempore of the Senate and Chairman of the Judiciary Committee keep his schedule very full, and I appreciate his taking the time to appear with me today. Mr. Chairman, I also sincerely appreciate your introductory remarks.

I am deeply honored by the confidence which President Reagan and Secretary Brock have shown in me through their nomination of me for the challenging position of Solicitor of Labor, and I welcome this opportunity to appear before you today as you consider that nomination.

I came to the Department as Deputy Solicitor for National Operations on April 8, 1985. On December 9, 1985, Francis X. Lilly resigned as Solicitor to return to private life, and Secretary of Labor William E. Brock assigned the duties of the Solicitor to me. I have been performing these duties

since that time. It has been a challenging, exciting, and rewarding fourteen month period.

Mr. Chairman, I would like to take this public opportunity to express my appreciation to my wife, Rhonda, and our two children, James and Jihan, for their support during this past year. They have been a constant source of strength, inspiration, and understanding during my tenure of government service. Their contributions to my presence here today are only exceeded by my appreciation.

Mr. Chairman, Secretary Brock has brought to the Department of Labor strong and purposeful leadership. He has instilled in his team an ambitious vision and agenda for enhancing the lives of the working men and women of America. His enthusiasm and zeal are contagious, and under his leadership, the Department of Labor is a vital and exciting agency charged with fulfilling the mission for which it was created. Secretary Brock challenges all of us at the Department to exert our best efforts to serve this nation's workers. I am deeply honored and exceedingly proud to be part of his team.

The Department of Labor is charged with the administration and enforcement, in whole or in part, of over one hundred and thirty statutes relating to employment and the workplace. Some obviously have more impact than others. However, most have a very real and perceivable effect on the lives of a great number of people. Among the more significant are those

which set minimum wages, provide for a safe and healthful workplace, protect pension rights, guarantee freedom from illegal employment discrimination, provide compensation for the unemployed, and facilitate training for the unemployed and the underemployed. We in the Solicitor's Office support the Secretary in his administration and enforcement efforts by engaging in a wide range of legal activities including providing informational legal advice on the application of these laws, instituting litigation in the Federal courts to enforce them, and drafting legislation to improve their statutory bases.

In a moment I will briefly describe some of our major recent activities and accomplishments in a few of these areas. But I would first like to tell you of the Department's efforts to gain perspective about itself.

When Secretary Brock came to the Department of Labor in April 1985, he perceived, correctly in my view, that any organization, particularly one as large and diverse as the Department of Labor, can carry out its individual agency programs much more effectively if it first articulates with some specificity its overall mission. All of us, whether in the context of our personal lives or as part of a larger organization, tend to get caught up in the details of day-to-day issues. Secretary Brock has asked his managers to think seriously about "the bigger picture," to focus on where we are going and what we hope to accomplish.

After a series of discussions with the Department's top management, Secretary Brock articulated three broad goals for the Department:

1. Improve the economic opportunity of American workers through emphasis upon job opportunities, health and safety, and retirement.

2. Increase the ability of Americans to compete successfully in domestic and world markets through labor-management cooperation; education, training, and retraining; and cost-effective regulations.

3. Improve productivity, effectiveness, and creativity of Department operations through employee motivation and involvement, intra-departmental coordination, and private sector support.

I believe that the morale at the Department is extremely high under Secretary Brock. He has brought an openness and attentiveness to the Department that are welcomed by all of us who work for him. The process of working together to formuate goals, and strategies for meeting those goals, has given the employees a strong sense of common purpose.

With this in mind, I would now like to turn to a brief discussion of some of our recent accomplishments and activities.

One of the first assignments I undertook for Secretary Brock was to chair an internal task force to recommend a plan to eliminate the serious backlog of black lung compensation

cases pending before administrative law judges in the Department. On September 30, 1985 the Secretary announced a plan to eliminate the backlog of approximately 21,000 cases within four years. The plan called for increased productivity by Department of Labor staff, and increased funding to hire additional adjudicatory personnel.

Although funding delays and constraints have prevented us from fully reaching our case disposition target of 8,500 cases during this first year of implementation, the plan appears to be on target for next year, and we are well on our way to significantly reducing an intolerable backlog in cases.

The Fair Labor Standards Act has kept us busy as well due to the Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority in which the Court overruled the National League of Cities case. Thus, the minimum wage and overtime provisions of the Act would apply to all State and local government employees, except those specifically excluded. As a result of this decision, approximately seven million additional employees would be covered by the FLSA's minimum wage and overtime provisions.

Following the Court's decision in Garcia, literally thousands of State and local government officials, public employer associations, and employee union representatives contacted the Department regarding implemetation of the decision.

You, the Congress, heard from them as well, as they urged legislative action to overturn the effects of the decision. The Department was able to work with the affected governments, workers, and the Congress to achieve a solution which struck a balance between the legitimate fiscal concerns of the State and local governments and the legitimate labor protection concerns of their workers. Our collective efforts resulted in the enactment of the Fair Labor Standards Amendments of 1985, which were signed into law by the President on November 13.

The Solicitor's Office is working diligently to assist in the development of implementing regulations which will address many important issues raised by these new provisions. These include the treatment of expenses, benefits, and fees for volunteers, and special sleep and meal time rules for law enforcement and fire protection personnel.

As I noted earlier, one of Secretary Brock's goals is to place emphasis on improving economic opportunity for Americans in their retirement. This translates into an increased emphasis on our administration and enforcement of the Employee Retirement Income Security Act of 1974, or ERISA as it is familiarly known. Our aggregate efforts are providing heightened protections to millions upon millions of working and retired Americans. In the Solicitor's Office we are seeking ways to improve our support for our program agency, the Pension and Welfare Benefits Administration. In the past, due to the statute's

relative newness, its highly technical nature, and the need for coordination among agencies such as the Internal Revenue Service and the Pension Benefit Guaranty Corporation, the Department's legal efforts relating to ERISA were concentrated in the Washington National Office. We are more sophisticated with ERISA now, and we believe that it is appropriate for our Regional offices to be active in ERISA enforcement. This increased ability to enforce the statute will significantly enhance the protections afforded by the Act.

The issues raised by ERISA are complex and varied. Just some that have been occupying our time and efforts of late are the roles of service providers, post-retirement health benefits, and the definition of plan assets. The Department is also taking a close look at our reporting requirements and forms to ensure that we receive the information which is necessary for us to effectively enforcement ERISA.

Mr. Chairman, you are as aware as any regarding the progress the Department has made in its oversight of and litigation with the Teamsters' Central States Pension and Health and Welfare Funds. This progress is due in no small part to the diligent efforts of the past two Solicitors and the new bold leadership of the Funds. Words cannot accurately describe the abuses which historically plaqued those Funds. The combined efforts of a number of individuals has turned the Funds around, and all are to be congratulated.

However, we cannot and do not rest on our laurels with regard to the Central States Funds. We continue to monitor them to ensure that their participants and beneficiaries enjoy the full protections of ERISA. As a matter of fact, as late as April 30 of this year, we filed suit against the former named fiduciary and investment manager of the Pension fund.

In yet another area of our responsibilities, Secretary Brock has indicated on a number of occasions his resolve to improve safety and health conditions in the nation's workplaces. Under his leadership, efforts have been heightened to issue effective health standards. I would note that after a long regulatory process a standard relating to the presence of asbestos in the workplace was finally issued last week. I can assure you that the Office of the Solicitor plays a vital role in the development of these standards.

We are also bringing important OSHA enforcement actions, such as the recent one involving the Union Carbide plant in Institute, West Virginia. Following an August 1985 leak, OSHA conducted a comprehensive wall-to-wall inspection of the facility. This inspection resulted in the issuance of 221 citations for which penalties were proposed totalling $1,377,000. These represent the stiffest penalties in OSHA's fifteen year history. Union Carbide has contested the citations and proposed penalties. Under the procedures, the matter

now goes to the Occupational Safety and Health Review Commission and from there to the appropriate Court of Appeals. We are optimistic that our action will be sustained.

Mr. Chairman, you are well aware of the ongoing discussions within the Administration regarding the affirmative action provisions of Executive Order 11246, as amended. They have not impeded our enforcement activities with regard to the anti-discrimination provisions of that Order. Closing arguments were recently heard by an administrative law judge in OFCCP v. Harris Trust and Savings Bank, and we hope he will expeditiously issue his opinion. In this case the Department has alleged that the bank engaged in a complex pattern of sex and race discrimination. For example, women and minorities were excluded from departments in which employees enjoyed greater upward mobility. In addition, the Department has filed numerous suits alleging violations of Section 503 of the Rehabilitation Act of 1973 for employment discrimination against handicapped individuals.

This quick overview of some of the Department's activities and accomplishments over the past year or so demonstrates the commitment of Secretary Brock to effectuating the Department's mandates. I would like to think that I have assisted him in these matters, and I would hope that by confirming me to the position of Solicitor you will allow me to continue in these and other important endeavors.

Mr. Chairman, I would be inexcusably remiss if I did not make special mention of a group of individuals who deserve our united respect and gratitude. The Office of the Solicitor presently employs approximately 460 attorneys in the Washington National Office and the sixteen regional and subregional offices. They are backed up by a large support staff. I came to the Department with high expectations for these individuals' abilities and performance. My expectations have been exceeded. These men and women are as hard-working and conscientious a group of professional individuals as I ever expect to meet or have the pleasure to work with. They daily manifest an excellence in professionalism and integrity which the legal profession should strive to emulate. It is a personal honor for me to be associated with them.

Mr. Chairman, let me close by once again paying tribute to my boss, Secretary Brock. He has imparted on all of us at the Department his priorities: that every American has an inherent right to a job; that there is dignity in work; that work is opportunity; and opportunity must be equal for all. I want to continue to work with him to effectuate these goals.

Thank you very much.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: SALEM (LAST) GEORGE (FIRST) RICHARD (OTHER)

Position to which nominated: Solicitor of Labor Date of nomination: March 14, 1986

Date of birth: Dec. 24, 1953 (DAY) (MONTH) (YEAR) Place of birth: Jacksonville, Florida

Marital status: Married Full name of spouse: Rhonda M. Ziadeh Salem

Name and ages of children: James George, 4½ yrs.
Jihan Camille, 3 yrs.

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Robert E. Lee Sr. High School, Jacksonville, FL	1968	1971	High School Diploma
Emory University Atlanta, Georgia	1971	1975	B.A.
Emory University School of Law, Atlanta, GA	1975	1977	J.D.
University of Florida Cambridge-Warsaw International Trade Program, Jacksonville, Florida	1976	1976	Summer Quarter Credit
Georgetown University Law Center, Washington, D.C.	1981	1984	L.L.M. - Labor

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Omicron Delta Kappa (National Honorary Leadership Fraternity); National Honor Society

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
District of Columbia Bar		1981
State Bar of Georgia		1978
American Bar Association (Labor & Employment Law Section)		
Georgia Bar Association		
Florida Bar Association		
The Florida Bar		1979
See Attachment #1		

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

Emory University, Atlanta, GA, Residence Hall Director, (9/76-6/77) [part-time, during the academic year]

Thompson & Pace, Atlanta, Georgia, Law Clerk & Attorney (9/76-12/79)

Thompson, Mann and Hutson, Attorney/Partner, Washington, D.C. (1/80-4/5/85)

Office of the Solicitor, Department of Labor, Deputy Solicitor for National Operations (4/85-12/85); Acting Solicitor (12/85-4/86), Washington, D.C.

Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

None.

Published writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

"NLRB Extends Scope of Protected Concerted Activity," 17 Georgia State Bar Journal 45 (August 1980)

"Nonmajority Bargaining Orders: A Prospective View of United Dairy Farmers," 32 Labor Law Journal 145 (March 1981)

Political affiliations and activities: List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

Reagan/Bush Campaign and Republican Party of Florida, 1980; National Executive Director, Ethnic Voters Division, Reagan-Bush '84, February-November 1984; Century Club, National Republican Heritage Groups Council, 1984 and 1985

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

N/A

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

No.

3. Has a commitment been made to you for employment after you leave Federal service?

No.

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Yes.

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

Under the terms of my Withdrawal Agreement from the law partnership of Thompson, Mann and Hutson, I receive $4,000 per month as return of capital and severance from May 1985 through April 1986. I have recused myself from all dealings with the law firm or its clients pending completion of all payments under this Agreement.

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

See Attachment #2.

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None.

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

None.

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

I will continue to recuse or divest myself, as appropriate, from any matter involving potential conflicts of interest or those which present the appearance thereof. In addition, I will refer potential conflicts of interest to the Alternate Designated Department of Labor Ethics Officer and, where appropriate, seek the advice of the Office of Government Ethics.

GEORGE R. SALEM
ATTACHMENT 1

MEMBERSHIPS:

District of Columbia Bar Association, Member, Labor Relations Division

Omicron Delta Kappa, National Honorary Leadership Fraternity

Delta Theta Phi, Legal Fraternity

Student Government Association, Robert E. Lee Senior High School (Vice President, 1970-71)

National Honor Society, Robert E. Lee Senior High School (1970-71)

Key Club, President (1971)

United Palestinian Appeal, Inc. - § 501(c)(3) Tax-exempt Charity - Treasurer (1982-March 1985)

American Ramallah Club, Metropolitan Washington, D.C. Chapter - 1984 - President

Association of American Arab University Graduates, Member - 1985

National Association of Arab Americans, Member

Century Club, National Republican Heritage Groups Council

Pi Kappa Alpha Fraternity, Social Fraternity, Member (1971-75)

Emory University Student Government Association, Student Government Body, Legislator (1975)

American Federation of Ramallah, Palestine
Chairman, Human Rights Committee (1982-1984)
Representative, Council of Presidents of Arab American Organizations (1984-85)

The Arab American Institute, Member, Board of Directors, Nonpartisan Ethnic Political Advancement (January-March 1985)

Arab American Republican Federation, President (Elected March 2, 1985; resigned March 25, 1985)

Arab American Anti-Discrimination Committee - Member

GEORGE R. SALEM
ATTACHMENT 2

POTENTIAL CONFLICTS:

AT&T

Allied Corp. (Allied-Signal Inc.)

Occidental Petroleum

Texaco

WOOPS (Washington Nuclear Power Reactor Bonds)

Merrill Lynch

Thompson, Mann and Hutson

Quality Travel Services, Inc.

Thompson-McKinnon Securities

Riverside Group

Mesa Limited Partnership

C&S Bank of South Carolina

Sovran Bank

The CHAIRMAN. Thank you, Mr. Salem.

Just explain for the committee what is the size of the Solicitor's Office at the Department of Labor?

Mr. SALEM. Mr. Chairman, we have 710 total personnel; approximately 460 of whom are attorneys, spread between the Washington national office and 16 regional and subregional offices.

The CHAIRMAN. How many cases or issues is your division at the Department of Labor, for instance, handling at this time?

Mr. SALEM. Presently, we have in excess of 115,000 cases in various stages of litigation.

The CHAIRMAN. I see, 115,000. As you know, we are here today to discuss two specific items from the thousands of issues that are really being handled by your office—the fact that the meetings of the Task Force on Terminations were held in private, and the granting of waivers to members of that task force.

Now, would you explain why the Task Force on Terminations was created?

Mr. SALEM. Certainly, Senator, and I welcome the opportunity to do so. The task force was created in response to an asserted need that the Secretary of Labor conduct a study on pension plan terminations, resulting in residual assets under section 4044(d) of ERISA.

Indeed, the budget reconciliation bill called for such a study and directed that the Secretary would submit a report of the study and any recommendations for statutory change, which include the Single Employer bill.

Secretary Brock and Assistant Secretary Kass decided that the best and the fastest way to conduct the study was to assemble a group of experts. They decided that the ERISA Advisory Council was the best mechanism for airing views and ultimately, after public hearings, for making those recommendations to the Department.

Developmental work needed to be accomplished, Mr. Chairman, so the Department created this task force which would study the termination and reversion issues expeditiously and present their findings and recommendations to the public forum of the ERISA Advisory Council.

The plan was then and has remained that the Advisory Council itself would resolve all issues, and that the task force would only report to the Advisory Council. The Advisory Council would deliberate actively, publicly, with interested members of the public having an opportunity to present their views and being in attendance. And Senator, I am proud to say that this has happened on three separate days of Advisory Council deliberations.

Senator METZENBAUM. Say that again. What did you say had happened on three separate days?

Mr. SALEM. That on three separate days, Senator Metzenbaum, the Advisory Council met and deliberated, and is still deliberating, the recommendations of the Termination Task Force. Those days, Senator Metzenbaum, are June 2, June 3, and June 12.

Senator METZENBAUM. Those are public meetings.

Mr. SALEM. Yes, sir—public meetings with all members of the interested public, with active debate, sir.

63-114 0 - 86 - 2

The Advisory Council, Mr. Chairman, it is anticipated, will be issuing its report sometime in the foreseeable future to the Secretary, and the Secretary will be taking that report and will be consulting with all interested Members of Congress and with any other interested parties in deciding what to do about this very important issue.

The CHAIRMAN. Well, in other words, the task force was created to provide the Advisory Council with a recommendation on plan termination policy?

Mr. SALEM. Yes, Senator, absolutely.

The CHAIRMAN. And it is my understanding it was not supposed to draft the Advisory Council's recommendations, let alone the Department's position; is that correct?

Mr. SALEM. That is correct, Senator.

The CHAIRMAN. OK.

Mr. SALEM. The Department, as I said, will of course study the Advisory Council's report when it is finally issued, and will be consulting with all interested parties. That process is still ongoing.

The CHAIRMAN. All right. What was the basis for the decision that the task force would meet in private?

Mr. SALEM. Well, Senator, as a developmental working group which reports to an advisory council and which does not directly advise the executive branch—either the Secretary or the President—the task force was not subject to the procedural requirements of the Federal Advisory Committee Act.

The task force was gathering information and engaging in the underlying developmental and staff work for the Advisory Council, which held meetings open to the public. The Advisory Council is itself fully subject to the Federal Advisory Committee Act.

Therefore, based on applicable case law, specifically, the *National Anti-Hunger* case, a 1983 Court of Appeals for the District of Columbia decision, it was decided that meetings could properly be held in private.

The CHAIRMAN. That is great. Why did the Department choose to grant waivers to the members of this task force?

Mr. SALEM. Well, Senator, we had two choices. We could either have deemed the task force members to be public representatives, representatives of specified interests, or we could have deemed them to be special Government employees. If they were deemed to be representatives of outside interests, then they would not be employees, and the conflict of interest restrictions would not apply to them. However, if they were deemed to be special Government employees, they would be covered by the conflict of interest restrictions.

We chose the more cautious and prudent approach. By making these people government employees, we made them subject to the conflict of interest restrictions. I, and I gather the Office of Government Ethics, with whom we closely coordinated throughout this process, are very comfortable with what we did.

Once we made the determination they were covered, we needed to obtain the financial information from them so that we could determine the appropriate parameters of their actions.

After receiving the financial information and after staff consultations with the Office of Government Ethics, we decided that limited

waivers were appropriate. The conflict of interest law expressly provides for waivers in section 208(b).

The waivers that we have issued state that they only extend to matters of broad policy and general applicability. They do not extend to actions or matters which have a direct, predictable, or unique effect on the employees' interests or those of other persons specified in section 208.

We consulted with the Office of Government Ethics with respect to each waiver. We thus enabled task force members, Mr. Chairman, to bring their nongovernmental expertise into the governmental process and enabled them to engage in broad policy issues without fear of criminal sanctions, yet limited the waiver so it did not apply to any interest which would directly, predictably, and uniquely be affected by any recommendation.

We also, Mr. Chairman, feel that the waiver serves an additional, very useful purpose, and that purpose is of educating individuals and helping them understand the appropriate parameters of their actions. Again, I am very comfortable with what we did.

The CHAIRMAN. Well, thank you. As I understand it, the task force has been disbanded. Am I right on that?

Mr. SALEM. Yes, Mr. Chairman. The task force has issued its report to the Advisory Council, and the ball is now in the Advisory Council's court, where they are actively deliberating these issues, in the public domain.

The CHAIRMAN. All right. Now, would it be correct to summarize, Mr. Salem, that given the questions raised about the status of the task force members, you chose a course of action that ensured that the 12 members were subject to conflict of interest restrictions, that provided them with a clear understanding of their status under the laws that existed, that was consistent with existing legal precedent, that upheld the public interest, and that was explicitly approved by the Office of Government Ethics; is that correct?

Mr. SALEM. Yes, Mr. Chairman, all of that is correct.

The CHAIRMAN. OK. Now, one final question. In his written statement, Mr. Martin of the Office of Government Ethics, who will be our next witness, states that if the Government wanted the members of the task force to have some expertise or interest in pension terminations, then the steps that you followed were—and I quote—"not only, we believe, proper and responsible, but commendable," unquote.

Mr. Martin goes on to express his hope that more agencies will follow your course of action. Consequently, Mr. Salem, did the Department grant partial waivers to the members of the task force because it was the best way under the law to ensure the ethical participation of individuals who were knowledgeable in the area of pension terminations?

Mr. SALEM. Yes, Mr. Chairman, that is precisely what we did.

The CHAIRMAN. OK. Those are the only questions I have at this time.

Senator Metzenbaum.

Senator METZENBAUM. I am glad the chairman did not see fit to ask any leading questions. [Laughter.]

The CHAIRMAN. You see, that is typical of Senator Metzenbaum; if I ask regular questions, he gets mad about it.

Senator METZENBAUM. No, I never get mad at you, Senator Hatch. You know that.

Mr. Salem, as you well know, I have been concerned about the pension terminations and the taking out of pension funds established to protect the retirement of employees who have given of themselves to the corporations for which they work, billions of dollars that might otherwise be available to provide for their retirement.

I am not the only Member of Congress who has addressed himself to this issue. Congressman Roybal in the House as well as a substantial number of members of his committee, the Labor Committee over there, have indicated their concern, and I might say that I myself was overwhelmed at a hearing on this subject at how much participation was had from the minority–that is, the minority in the House, Republican Members.

As a consequence of the interest of Members of Congress, the advisory committee has been brought into this, and there was an assurance made by the Secretary of Labor as well as by Mr. Kass when he was up for confirmation, that this issue would be reexamined.

The chairman has inquired of you with respect to the technical aspects, but on the perception of the law by the public of this issue, we find that people who make their living advising and putting through pension terminations were given waivers so that they might participate in the task force, and then we also find that they were permitted to meet secretly.

I am frank to tell you, Mr. Salem, I am not interested in the technical language that made it possible for you to grant the waiver. I am interested in why you did it. All the gobbledygook that we just heard does not mean anything to me. I believe that you loaded the dice on us—not you, but the Labor Department—loaded the dice on us, gave us a loaded deck of cards, where they knew in advance that such a task force could not come out with any recommendations truly supportive of the right of the employees to participate.

So I must say to you that I am very disappointed. I am disappointed in the Department of Labor, disappointed in the Advisory Committee, although they have not as yet acted, and very disappointed in the task force. But more than any, I am disappointed that they were permitted to meet in secret and that they were given waivers—more waivers by you than the total number of waivers given in the last 5 years

Now, you can make out arguments as to why you did it, and why you should have done it, should not have done it or should do it. The fact is that you did it. And any retired worker who is losing his benefits in the future will be able to look back and say, "My Government waived the law in order that they could give us a stacked deck to members of the task force to come up with a recommendation to the Advisory Committee."

You did not violate any laws, as far as I know, but I must tell you, I think you violated good judgment.

I have a question here that has nothing to do with this subject. I will get back to the subject. But as a courtesy to Senator Kerry, I will ask you: "As you know, the Department of Labor and the De-

partment of Housing and Urban Development have for some time been involved in a jurisdictional controversy having to do with the applicability of the Davis-Bacon provisions to projects when Federal moneys in the form of UDAG or CDBG funds are used in a different but related portion of a project."

Sentor Kerry continues on, "It is my understanding that you have been involved in discussions with HUD about settling this conflict and developing a policy for the future. I would appreciate it if you would tell us where you are in this process."

Mr. SALEM. Senator, I am delighted to respond to the question and thank you for it.

We are presently engaging in extensive discussions with the Office of the General Counsel of HUD to determine the appropriate parameters of CDBG grants and how we can determine whether or not Davis-Bacon would apply in CDBG circumstances.

The issue specifically arises as a result of a Wage Appeals Board decision involving the city of Muskogee, OK, where the Wage Appeals Board held that section 110 of the Housing Act applies to construction financed in whole or in part by UDAG and CDBG moneys. Specifically, that project was a UDAG project, Senator.

With respect to CDBG projects, however, we are in close touch with the general counsel of HUD in an attempt to determine how to appropriately deal with CDBG, and will be issuing a response to the letter for reconsideration shortly.

Senator METZENBAUM. Shortly?

Mr. SALEM. Yes, sir.

Senator METZENBAUM. You might want to respond further, directly to Senator Kerry.

Mr. SALEM. Yes, sir. Thank you for the question.

Senator METZENBAUM. Now as to the subject itself. Mr. Salem, what is your role regarding enforcement of ethics laws and regulations at the Department?

Mr. SALEM. Well, Senator, our role as the chief ethics counselor is to make sure that all of the various ethical considerations are properly applied and that the Ethics in Government Act is properly enforced. In connection with that, we deal closely with the Office of Government Ethics and maintain very close touch with them.

Senator METZENBAUM. Describe the departmental regulations and any other law that governs the ethical conduct of the employees of the Department of Labor.

Mr. SALEM. Well, sir, we have an active program to inform employees concerning applicable laws and regulations. We have training efforts where we train employees. We have conducted 10 sessions over the past year where over 200 employees were trained with respect to the Ethics in Government Act and their obligations thereunder.

Indeed, the Secretary sent a memorandum on March 11 of this year to all employees, emphasizing the responsibilities and obligations of the Ethics in Government Act.

Senator METZENBAUM. And one of the regulations that are applicable in this situation, having to do with conflicts of interest or avoiding appearances of conflict of interest, can be found in regulation .735–11, which reads as follows:

No employee of the Department of Labor may accept any outside employment, engage in any outside business, professional or other activity, or have financial interest if such employment, activity, or interest would be or appear to be in substantial conflict with the interests of the Department or the Government; would interfere with the performance of official duties; would prevent a regular employee from rendering fulltime service to the Department, or require so much time that his efficiency is impaired, or if such employment, activity or interest would bring discredit on the Department or the Government.

In addition, no employee may engage directly or indirectly in a financial transaction as a result of or relying primarily on information obtained through his government employment.

(c) No employee may use or appear to use his government employment to coerce any person, enterprise, company, association, partnership, society, or other organization or other instrumentality to provide financial benefit to himself or any other person.

Now, does that not indicate to you that an employee cannot be involved in any transaction or involved in any undertaking which would appear to provide a conflict of interest, whether it does or does not in fact?

Mr. SALEM. Yes, Senator. What you are describing are the Department of Labor regulations applicable to full-time Government employees.

Senator METZENBAUM. I understand.

Mr. SALEM. The command that all employees, including special Government employees such as those on this task force, avoid even the appearance of impropriety is a strong command that we take very seriously.

Senator METZENBAUM. So that you make a distinction between the task force members and employees and feel that that is sufficient to warrant the permission of those who would appear to or do have a conflict of interest?

Mr. SALEM. I make no distinction vis-a-vis conflicts of interest, sir. What I said was that avoiding the appearance of impropriety is of paramount importance.

The provisions you have just read, however, deal with full-time employees, rather than with special Government employees, Senator.

Senator METZENBAUM. I am saying to you, you are making a distinction between full-time employees and people who sat on the task force.

Mr. SALEM. Well, that is true—special Government employees, people who sit on the task force who are full-time professionals elsewhere, are different than full-time employees of the Federal Government; yes, sir.

Senator METZENBAUM. Even though those task force members might be making policy decisions or making policy recommendations that are far more significant than any single Labor Department employee might make.

Mr. SALEM. Senator, we have to keep in mind what these task force members were charged with. They were charged primarily with developmental work, gathering information, and deliberating in order to make recommendations to an Advisory Council. They were very far removed from making any decisions.

Indeed, the Advisory Council in 3 active days of open debate has debated each of the issues that was presented by the members of the task force and in the task force report, and the Advisory Coun-

cil is reaching an independent determination after full and considered public discussion where public members were able to present their testimony and their comments.

And then beyond that, once the Advisory Council, Senator, finally issues its report, it will go to the Secretary, and the Secretary will fully deliberate.

Senator METZENBAUM. Well, I understand that the Secretary will make the final decision, and I understand the Advisory Council, but the fact is the task force was very important in making its recommendations on this issue. It was created for that purpose, wasn't it?

Mr. SALEM. It was created to report to the Advisory Council, which would openly deliberate; yes, sir.

Senator METZENBAUM. Well, wasn't it also created to make recommendations to the Secretary?

Mr. SALEM. No, sir. It was created to make recommendations to the Advisory Council which after due deliberation would make recommendations to the Secretary.

Senator METZENBAUM. Then, are you telling me that this press release that I have in my hand from the U.S. Department of Labor was inaccurate——.

Mr. SALEM. Yes, Senator; that is exactly what I am telling you, and that was acknowledged——.

Senator METZENBAUM [continuing]. Just a moment, just a moment, let me finish my question.

Mr. SALEM. Certainly, Senator.

Senator METZENBAUM. Let me read you what it says on the press release from the U.S. Department of Labor, Contact Charles Lee.

Brock announces group to study pension termination. Secretary of Labor Brock today announced that the Advisory Council on Employee Welfare and Pension Benefits has formed a bipartisan task force to study issues relating to pension plan terminations in which excess assets revert to sponsors of employee benefit pension plans covered by the Employees Retirement Income Security Act, ERISA.

The task force will examine the effects on benefit security of plan terminations involving asset reversions, determine whether there were any adverse effects that cannot be dealt with satisfactorily in the context of existing law as interpreted in the administration's guidelines promulgated in May 1984, develop criteria that can be used to evaluate any proposed changes in the statute, and if appropriate, make specific legislative or administrative recommendations to the Secretary.

And you are saying that press release is inaccurate?

Mr. SALEM. Yes, sir. If you will look at the very last line of that press release, there is a very blatant inconsistency, Senator. May I read that to you?

Senator METZENBAUM. Yes.

Mr. SALEM. It says, and I quote: "Mr. Ryan will serve as Chairman of the Task Force, which will report its findings and recommendations to the Council." That means the Advisory Council.

Indeed—first of all, let me say a press release is a colloquial document and is not a legally precise document. The Department established a task force. The mistakes that you have alluded to are those that I referred to in a letter that I wrote to the Director of the Office of Government Ethics, David Martin, when I explained that the task force would report to the Advisory Council, and to that effect, the paragraph that you just read, Senator, that last clause, is a mistake and is incorrect.

Senator METZENBAUM. There is not much I can do about that. I guess that is between you and the press department, or secretary.

Now, as a matter of fact, in that press release, it says that the Advisory Council is going to name the task force. Isn't it a fact that Mr. Kass chose the members, and then he called the Advisory Council individually and asked them to sign off on the choices?

Mr. SALEM. Yes, Senator; that is correct. That is another mistake in the press release, sir.

Senator METZENBAUM. I will just tear that right up, then, because it does not mean anything. Let us go on.

In that press release that we just tore up, it also said—pardon me, I withdraw that.

Would you want to describe the background of the members of the task force?

Mr. SALEM. I can, sir, if you would like me to. I do not know these individuals.

Senator METZENBAUM. OK.

Mr. SALEM. There are 12 of them. The first—and they are in alphabetical order, Senator—is William T. Coleman, who is a partner with O'Melveny and Myers, formerly Secretary of Transportation of the United States.

Senator METZENBAUM. I guess I do not need to have you do that, because we have the list here, and I just would ask unanimous consent that we just put that list in the record.

The CHAIRMAN. Without objection.

[The list referred to above follows:]

TERMINATION TASK FORCE

T. Timothy Ryan
Partner
Pierson, Ball and Dowd

William T. Coleman, Jr.
Senior Partner
O'Melveny and Myers

Harold Dankner
Partner
Coopers & Lybrand

John N. Erlenborn
Partner
Seyfarth, Shaw, Fairweather & Geraldson

Gerald D. Facciani
President
Facciani & Company

Michael A. Forscey
Partner
Wilkinson, Barker, Knauer & Quinn

Henry James
Vice President
Goldman Sachs & Company

Bruce E. Langton
Assistant Treasurer
IBM Corporation

George W. Lehr
Executive Director
Central States, Southeast and Southeast Areas Health and Welfare and Pension Funds

Dallas L. Salisbury
President
Employee Benefit Research Institute

Lawrence T. Smedley
Associate Director
Department of Occupational Safety, Health, and Social Security, AFL-CIO

Harvey Young
Senior Vice President
Metropolitan Life Insurance Company

Senator METZENBAUM. Now, obviously, the task force is made up of persons with a view on the issue, or at least they have some expertise—they were chosen for that reason. But there is a difference between having a view and having or appearing to have a conflict of interest; a financial conflict.

If the Department of Labor regulations do not govern this task force, what conflict of interest rules would you apply?

Mr. SALEM. Well, the conflict of interest rules contained in section 208, sir, of the Ethics in Government Act, which are the provisions that do apply to all employees, including special Government employees.

Senator METZENBAUM. Well, the fact is that almost with no exception, with a couple of exceptions, every one of those people on the task force are involved in handling pension fund terminations, or advising in connection with that—is that not correct—whether or not there were any pending at the time they were sitting on the task force?

Mr. SALEM. I do not know, Senator, whether all of them deal with pension plan terminations. I will agree, however, that all are involved in pension plan issues. Whether they are involved in terminations or reversions is a question that I cannot answer.

They were selected because of their background in the pension area, sir.

Senator METZENBAUM. Well, Mr. Walker, who is the Deputy Assistant Secretary, David M. Walker, he was quoted as saying, "The fact that many task force members have represented employers' interests on termination matters the past," he said, "does not prejudice them one way or the other."

Doesn't that pretty much confirm that most of them or many of them were involved or are involved in advising employers with respect to pension fund terminations?

Mr. SALEM. Well, you would have to ask Mr. Walker, but from what you read, it did not sound as if—was he referring to the task force, Senator, when he said that?

Senator METZENBAUM. He sure was.

"The fact that many task force members have represented employers' interests on termination matters in the past," he said, "doesn't prejudice them one way or the other."

Mr. SALEM. Well, Mr. Walker is in a much better position to know than I——.

The CHAIRMAN. Would you yield for a second? There were people like Larry Smedly on the task force who handled pensions——

Senator METZENBAUM. He is one exception.

The CHAIRMAN. No, he is not. There was George Lehrer from Central States Pension Plan, who has done a marvelous job of resolving almost unresolvable problems there.

You had Mike Forcey, former counsel to this committee for Senator Kennedy, always on the side of——

Senator METZENBAUM. What does he do now? What does he do for a living now?

The CHAIRMAN. Well, I do not know, but I know one thing, Mike Forcey has always been on the side of labor, and I cannot imagine anybody saying he is not there.

Senator METZENBAUM. He practices law with the Washington firm of Wilkinson, Barker, Knauer & Quinn, counsel to the Metropolitan Life Insurance Co.——

The CHAIRMAN. Well, what does that have to do with it?

Senator METZENBAUM. What does it have to do with it?

The CHAIRMAN. Not a thing.

Senator METZENBAUM. Well, it sure has, because Metropolitan Life Insurance Co. sure has a big stake in this whole issue.

The CHAIRMAN. So that means it changes his whole philosophy of life? Look, I know Mike Forcey, and nothing is going to change that philosophy. [Laughter.]

Senator METZENBAUM. Mr. Chairman, I do not want you to interrupt me.

The CHAIRMAN. No. But I do want to point out, Howard—let us be fair about it.

Senator METZENBAUM. I just want to say to you, Mr. Chairman, do not tell me about people who are around the Halls of Congress who are on one side of the issue one day and then go out for a buck and represent people on the other side of the issue.

The CHAIRMAN. Oh, I understand.

Senator METZENBAUM. And that is the reason we have Strom Thurmond's bill, which I strongly support, and that includes Members of the Congress, as well.

The CHAIRMAN. Well, let me just add one other thing, if I could. As I understand it——

Senator METZENBAUM. Mr. Chairman, you asked me to be brief, and I am trying to be brief, and now you have made a long——

The CHAIRMAN. Well, but be courteous to me, too, Howard. I am going to be courteous to you.

Senator METZENBAUM. Of course, I will be courteous. I still am to you.

The CHAIRMAN. The task force report, as I understand it, just to make Mike Forcey's case again, was contrary to the position of Metropolitan Life Insurance, as I understand it.

Senator METZENBAUM. You are more familiar with their position than I am.

The CHAIRMAN. That has been my understanding.

Senator METZENBAUM. All right. Mr. Chairman, may I proceed?

The Chairman. Surely.

Senator METZENBAUM. Mr. Salem, would you consider the composition of the task force balanced under the meaning of the Federal Advisory Committee Act—and I am not asking you whether the act applies; I am asking you whether you would consider it balanced under the meaning of that act.

Mr. SALEM. Well, Senator, as someone who did not set up the task force, I do not know. I can say it represents a good number of the interests that are involved.

As Senator Hatch mentioned, the AFL-CIO——

Senator METZENBAUM. The AFL-CIO has one person on it.

Mr. SALEM. Yes, sir.

Senator METZENBAUM. The Central States Pension Fund—and I am not sure where they are coming from at any particular time, and we do not know much about that particular fund and all of its history, and I am not going to get into that—but I am not——

The CHAIRMAN. Well, I know a lot about it.

Senator METZENBAUM [continuing]. Mr. Chairman, if you please——

The CHAIRMAN. Go ahead. I will try not to interrupt you, Howard. I know that you will do your best.

Senator METZENBAUM [continuing]. And Mr. Forcey, who is obviously with a major law firm in this community that is involved in these issues. So I am asking you whether or not in your view, you consider the task force balanced under the meaning of the Federal Advisory Committee Act?

Mr. SALEM. The Advisory Council is balanced. The task force could be more balanced.

Senator METZENBAUM. Now, when and where did the task force conduct its meetings?

Mr. SALEM. When?

Senator METZENBAUM. Just generally.

Mr. SALEM. I can give you the exact dates, Senator.

Senator METZENBAUM. OK.

Mr. SALEM. They met on December 20, 1985, January 6, 14, 27, 1986, February 20, 1986; March 3, and 13; April 30; and May 14.

They met, I believe, for the most part at the Department of Labor. I have not been involved in where and when they met. I just got this information.

Senator METZENBAUM. Were those meetings announced in the Federal Register?

Mr. SALEM. No, sir; they were not.

Senator METZENBAUM. Which meetings were closed to the public and which ones were open?

Mr. SALEM. Senator, I am not sure. I know at least one meeting of the task force, was open to the public where they requested and obtained public testimony.

Senator METZENBAUM. Isn't it the fact that most of the meetings were closed to the public?

Mr. SALEM. Yes; absolutely; yes, sir.

Senator METZENBAUM. If the Federal Advisory Committee Act applied to this task force, would it have been violated?

Mr. SALEM. Well, of course, the Federal Advisory Committee Act requires open meetings and notices in the Federal Register. Yes, Senator, if the Federal Advisory Committee Act applied, then by having closed meetings, they would have violated that act.

Senator METZENBAUM. The Federal Advisory Committee Act also requires balanced membership?

Mr. SALEM. Yes; it does.

Senator METZENBAUM. Now, I know that you are familiar with the National Anti-Hunger Coalition against the executive committee and the holding in that case.

What did the court hold in that case?

Mr. SALEM. Well, the Court of Appeals in that case held, Senator, that first of all, failure to have a public interest representative on an executive committee of the President's private sector survey on cost control did not mean it was not balanced for Federal Advisory Committee Act purposes; and second, they held that task forces such as those involved here, which engage in developmental work

are not subject to the procedural requirements of section 10 of the Federal Advisory Committee Act.

Senator METZENBAUM. That is, they held it was not covered because it was, "not established or utilized by any agency in the interest of obtaining advice or recommendation."

Now, in that case, the district court referred to the task force as merely performing "underlying staff work," and the appeals court in their affirming of the lower court decision said:

> The court's characterization of the task forces as the Executive Committee staff, and its conclusion that the task forces are not providing advice directly to the President, or any agency, were perfectly defensible. At the time, it appeared that the task force reports and recommendations would be exhaustively reviewed and revised by the Executive Committee, the entity nominally responsible for advising the President and Federal agencies. But the District Court's conclusions have been called into question by new evidence suggesting both that task force reports are transmitted directly to Federal decisionmakers before they are made publicly available, and that the Executive Committee is merely rubberstamping the task force's recommendations, with little or no independent consideration.
>
> Either of these facts, if true, might well have led the District Court to conclude that the task forces themselves were subject to the requirements of the Federal Advisory Committee Act.

Now, in view of that, they are reporting directly to decisionmakers; they are reporting to the Advisory Committee which then in turn reports to the Secretary—although the press report indicated they reported directly to the Secretary, but I agree with you, they are reporting to the Advisory Committee. Now, under those circumstances, you still concluded that the Federal Advisory Committee Act was not applicable; is that correct?

Mr. SALEM. Yes, sir. Indeed, the situation in *National Anti-Hunger* was that the task force reported to an advisory council, and the advisory council, subject to the provisions of the Federal Advisory Committee Act, reported to the President, or some Federal agency. The task force itself did not report directly to the Federal agency. That is the key.

The same is the case here, Senator. The task force reported to the Advisory Council and as such, is not subject to the public notice requirements of the Federal Advisory Committee Act.

Senator METZENBAUM. Well, I think they pointed out that either of the conclusions of the lower court, one of which was that, "The task force reports are transmitted directly to Federal decisionmakers before they are made publicly available, and that the executive committee is merely rubberstamping the task force recommendation with little or no independent consideration." Isn't it a fact that the Advisory Committee as of this moment—and as I understand it, part of their conclusions have been made public, although I am not certain about that—what is the fact with respect to the Advisory Committee deliberations up until now?

Mr. SALEM. Senator, they are open meetings, and I believe that they have a draft report which is not final as yet, that is being circulated among Advisory Committee members.

Senator METZENBAUM. Isn't it the fact that their draft report pretty much rubberstamps all of the task force committee report, with the exception of their having made a decision which the task force indicated should be made by them as to whether or not the

employees or the Government has the right to participate in a 10-percent factor?

Mr. SALEM. Senator, you know, I do not know what was in the task force report necessarily or in the final Advisory Committee report. But it is my understanding that—I was there for 2 days of those public hearings, and there was no rubberstamping; there was active debate.

Now, if they agreed with the task force findings, it was not a rubberstamp. It may have been an agreement after public and open discussion and debate.

Senator METZENBAUM. Well, I think that is a difference in degree, but that is not necessarily on fact. You can have open debate, but if you just wind up confirming everything the task force has done and then filling in the one gap that you were called upon to fill in, then I think it does pretty much fall within the district court's advice on the subject.

We will pass on. When were the financial disclosure forms filed by the members of the task force?

Mr. SALEM. Senator, they were filed in April.

Senator METZENBAUM. That was after they had met in closed session?

Mr. SALEM. Yes; it is after they engaged in several meetings in closed session, yes, sir.

Senator METZENBAUM. What is the practice at the Department in requesting disclosure forms?

Mr. SALEM. The practice is to request disclosure forms——

Senator METZENBAUM. When?

Mr. SALEM. When? Usually, before the services commence. But with respect to members of this task force, as I stated in response to a question from Senator Hatch, we had to deal with the threshold issue of whether these individuals were employees, and that was a very difficult issue that took a great deal of time.

Senator METZENBAUM. Mr. Salem, did it ever occur to you when you were making your decision with respect to closed meetings as well as with respect to granting the waivers, that you not only had a determination to make as pertains to the language of the law and the regulations, but you also had a determination to be made as to a matter of public policy which called for a judgment decision on your part?

Mr. SALEM. Yes, Senator. I was very mindful of that, sir.

Senator METZENBAUM. In view of all that, you still concluded that private meetings were best and that giving the waivers to these people, many of whom had a financial interest in the determination of the task force report, that you still should grant those waivers and permit these private meetings?

Mr. SALEM. Yes, Senator. Indeed, as the Office of Government Ethics is prepared to testify today, this is the sort of thing that is encouraged——

Senator METZENBAUM. Before we get to the Office of Government Ethics, let us not rely on them that much. You have an independent decision to make. The Office of Government Ethics has come out against the Strom Thurmond bill. I do not think they reflect the view of the Members of this Congress at the moment. I think the Office of Government Ethics has very much let down the bars

in this administration, and that is the reason you see so much publicity on the whole issue of ethics in government, a two-page spread of all the different people who have been involved in problems in this administration. So I am not sitting here very comfortable or concerned about how Mr. Martin testifies, because in his previous appearances, they have not been reassuring. So let us just talk about you. You are up for confirmation. He is past that point.

So I am more interested in you and your view than I am in Mr. Martin.

Mr. SALEM. Could you restate the question, Senator?

Senator METZENBAUM. Did it ever occur to you that you had a call to make which had to do with the perception of the integrity of Government and the integrity of this task force, and that if you could fall either way, that perhaps it was warranted that you fall on the side of protecting the public perception of the Government's conduct?

Mr. SALEM. Absolutely. You outlined precisely why we issued the waivers, Senator Metzenbaum. It was because we wanted to make sure first of all that these individuals were deemed to be Government employees and fully subject to the conflict of interest restrictions.

We could have gone the other way and not held that the Ethics in Government Act applied, but we took the far more cautious and prudent approach.

So I am very mindful of the——

Senator METZENBAUM. Tell me again why it was more cautious and more prudent. That is where you and I differ.

Mr. SALEM. Well, it depends, Senator. If we considered them to be nonemployees—that is, representatives of outside interests—then the conflict-of-interest laws, would not have applied at all, and your concerns would have been most readily manifest.

However, we, after careful consultation with the Office of Government Ethics and a lot of internal deliberations, decided to make them special government employees and fully subject to the conflict of interest restrictions. As such, we brought them onboard as employees and determined that under those constraints, that limited waivers which would enable them to engage in broad policy discussions without getting into their individualized interests, were appropriate.

Senator METZENBAUM. Let me read you what the Ethics in Government Act says:

> All employees, including special government employees, who participate, "through decisions, approval, disapproval, recommendations, the rendering of advice, investigation or otherwise," in a controversy or other particular matter in which he has a financial interest shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Now, that prohibition can be waived, quote, "If the employee first advises the government official responsible for appointment to his position of the nature and circumstances of the conflict and receives in advance"—in advance—"a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee."

Now, the facts are that members of the task force do have clients who want to terminate pension plans. I just do not understand how you can feel that this act could have been waived, and second, could have been waived ex post facto, as you did.

Mr. SALEM. Senator, first of all, any client interest, any individual who had a pending legal matter involving a termination, those individualized interests were not waived. Only general policy issues and matters of general applicability were waived in each of these waivers.

I agree with you, the act does apply, and the waivers are prospective only, not retroactive.

Senator METZENBAUM. The regulations apply. You have a regulation 735-20 which says, "Before an individual enters on-duty as a special government employee, expert or consultant . . . ," and then it goes on.

Now, what gets me is that you come in—excuse me. I withdraw that.

You are in this position. You do not have to waive it. What you said is we are going to require provisions of the law to be applicable; we are going to consider them as employees, and then we are going to waive the law. What accomplishment was there to that? What did you gain by doing that? Why didn't you just say that they were not employees, I mean, if you were going to waive the law?

Mr. SALEM. Well, we did not waive the law, Senator, as to any matters which could have directly or predictably impacted on any of the enumerated interests in the statute, section 208(a), which you previously read.

Senator METZENBAUM. Aren't we now quibbling as to whether or not—whether they had a specific interest in a specific case, or whether they had an overall interest in cases that they might not even have been hired to be involved in as yet? Isn't that a difference in degree rather than substance?

Mr. SALEM. Well, not necessarily, Senator, because when you have individuals who are not full-time Federal Government employees who are involved in an issue, the whole reason for bringing them into the process as special government employees is to get their expertise.

Now, individuals who are in that kind of a position are going to have general interests, obviously, as you say. If we did not have these provisions for enabling them to deal with these general policy issues, yet, maintaining the act's applicability to their own particular interests and interests that deal with them specifically, then there is no point in getting experts from the private sector, from the nongovernmental sector, into the Government.

Senator METZENBAUM. You do not think you could find any experts who did not have a financial interest either today or tomorrow that could help you on this issue?

Mr. SALEM. Well, Senator, as someone who did not appoint the task force, I could not say. I did not look. Perhaps you could. But if they have got expertise, they quite generally usually do have interests.

Senator METZENBAUM. Why did you finally ask for financial disclosure forms? What prompted you to make the request?

Mr. SALEM. When we determined that they were to be special government employees, we decided that they had to provide us with the nature of their interests.

In making a waiver determination, you must look at the duties of the employees, the duties the employee is to undertake, and the nature of the interest. After consultation with the Office of Government Ethics, we solicited information necessary to determine whether or not waivers were appropriate. The interests involved were such that none of the individuals on the task force were in a position to take final action in any matters involving their own particular interests.

Remember, the task force reported to the Advisory Council that reports to the Secretary, who will consult with your staff and everybody else's staff that is involved.

However, section 208 is very broad in terms of its coverage. These were special experts selected because of their expertise so we wanted services from them to be on broad policy or issues of general applicability.

We have an Assistant Attorney General opinion which finds that waivers such as those were granted were exactly what the law envisioned. Therefore, the waivers do not extend to matters which have a direct, predictable and unique effect on the interests enumerated in the statute.

In addition, with attorneys, the waiver does not apply to any action which would directly or predictably affect any legal matters being handled by their firm or pending before their firm.

Senator METZENBAUM. With whom else did you discuss this matter at the Department of Labor?

Mr. SALEM. Most of the discussions were at the staff level, quite frankly, but we discussed it primarily with the Pension Welfare Benefits Administration; we discussed it with the Secretary.

Senator METZENBAUM. Did you review each individual waiver yourself?

Mr. SALEM. I ultimately reviewed each individual waiver myself, yes, Senator. However, each was carefully crafted by staff in close consultation with the staff of the Office of Government Ethics.

Senator METZENBAUM. What did the disclosure forms reveal? Did they reveal any conflicts of interest?

Mr. SALEM. They revealed interests, yes. Mere service on a task force is not a conflict of interest. There are several steps that must be met before a conflict of interest is proven. There were interests in these forms, because these individuals came from the private sector and had these kinds of interests. But to de ermine a violation of law, we need to know several things. First of all, we had to reach the threshold question of whether the individual was an employee. We decided that, so that the Ethics in Government Act and the conflict of interest restrictions would apply.

Then you have to know what particular matters they participated in. You need to know whether or not the employee's participation was personal and substantial. You need to know whether the particular matters in which the employee personally and substantially participated directly and predictably impacted their own enumerated interests, and you had to know intent, what the employee's knowledge was.

So in answer to your question, Senator, the forms themselves would not show all this. They would only show interests.

Senator METZENBAUM. Well, the forms would show in the case of some of them that they represented a whole host of people that had an involvement with respect to pension terminations, didn't they?

Mr. SALEM. In some cases, yes, sir.

Senator METZENBAUM. But in all of them, you gave the waiver.

Mr. SALEM. But the waiver did not apply to any pending matter such as that, sir.

Senator METZENBAUM. But a general recommendation of the task force could very well apply to all of the matters, couldn't it?

Mr. SALEM. A general recommendation of the task force could well apply to everyone, but we go through several layers again, Senator—from the Advisory Council up to the Secretary; from the Secretary to the Hill. There are several layers.

Senator METZENBAUM. Is there something there that staff has provided you with that is some great gem of wisdom that we ought to share?

Mr. SALEM. I am sorry, Senator?

Senator METZENBAUM. I saw staff give you something, and I did not know if there was some great gem of wisdom that you wanted to make available to us.

Mr. SALEM. They provided me with wisdom. It says, "It is not anomalous to say that the statute applies and then waive it. That is what the statute contemplates."

They think more clearly than I, perhaps, at times.

Senator METZENBAUM. How many waivers were issued?

Mr. SALEM. Twelve—twelve to task force members.

Senator METZENBAUM. How many were issued in the last 5 years, covering Department of Labor employees?

Mr. SALEM. Senator, all those were provided to you. I could survey. I do not know.

Senator METZENBAUM. If I told you that our research has indicated that there were nine, would you think that that sounds like a reasonable number?

Mr. SALEM. If you say it is nine, Senator, then I take that at face value, since we provided you with all of them.

Senator METZENBAUM. Did any of the waivers cover client interests?

Mr. SALEM. Well, the waivers that you saw, Senator, were all for full-time Government employees, so there would not be any client interest at all, sir.

Senator METZENBAUM. All right.

Mr. SALEM. Remember, we are dealing with task force members who are not full-time Government employees.

Senator METZENBAUM. How much time was spent investigating and evaluating whether or not a waiver should be granted?

Mr. SALEM. Quite a bit.

Senator METZENBAUM. Days? Weeks?

Mr. SALEM. Days. Several days. We spent a great deal of time wrestling with the issue of whether or not they were to be employees and whether the statute would apply. There were very good arguments that they should not.

Senator METZENBAUM. I have one before me which indicates that the application for the waivers was made on April 24 at 3 p.m., and a waiver was issued on April 25, the next day.

I have another one that indicates the disclosure form was submitted on April 24 at 3 p.m., and a waiver was issued on April 25.

That does not sound like a great deal of time, does it?

Mr. SALEM. Well, those are 2 of 12. There was a great deal of time involved in all the others.

Senator METZENBAUM. Well, I just did not go through each of them on the time; I just tried to pick out a couple. Do you know whether or not—Mr. Chairman, am I permitted to use the names of these two men?

The CHAIRMAN. I do not know. Do we have an agreement on that? (Conferring with staff.)

Mr. SALEM. I can give you the dates of the filing, sir, of the financial disclosure information.

The CHAIRMAN. You can use the names, but do not get into the material.

Senator METZENBAUM. OK. Well, Henry James, manager of the pension department at Goldman Sachs, was the first person to whom I referred, and William Coleman is the second person to whom I referred.

Mr. SALEM. Yes.

Senator METZENBAUM. Do you know whether either Mr. James or Mr. Coleman have any clients where there might be a conflict of interest?

Mr. SALEM. I believe Mr. Coleman may. Mr. James—is he an attorney?

Senator METZENBAUM. Coleman is attorney for——

Mr. SALEM. I know who Mr. Coleman is. I am asking about Mr. James. I believe he is with Goldman Sachs & Co.

Senator METZENBAUM. That is correct. But I think the waiver indicated that they had client interest in pension terminations. In fact, the way we have it, Mr. Ryan's waiver indicates that he had client interest in pension terminations, yet I cannot find any mention of that fact on his disclosure form.

How do you know that to be the fact?

Mr. SALEM. I am sorry—which individual are you referring to?

Senator METZENBAUM. Ryan.

Mr. SALEM. Mr. Ryan. His disclosure—well, I think we are under fairly strict restrictions vis-a-vis discussion of the disclosure forms, Senator.

Senator METZENBAUM. Pardon?

Mr. SALEM. We are under some restrictions with respect to discussion of the disclosure forms.

Senator METZENBAUM. Well, I understand that, but what I am asking you is that the waiver indicates that he had client interest in pension termination, yet you cannot find that on the forms.

So I am saying, how do you know that to be the fact? How did you find that out? Did you get a form? How did you find out that he had a client interest?

Mr. SALEM. As I see it—I am looking at the Ryan waiver right now.

The waiver does not apply to any official actions which directly or predictably affect any legal matters pending before you or your firm, and any legal matters currently being handled by you or your firm. Thus, for example, the waiver does not apply to actions affecting matters pending before the Department of Labor in which you or your firm are involved.

I do not see anything in there about a pending termination, sir.

Senator METZENBAUM. Well, I am not going to belabor the point.

I think, Mr. Chairman, at this point, I would like to ask Mr. Ryan to appear before the committee. He is here.

The CHAIRMAN. Are we finished with Mr. Salem, or do you have anymore questions of him? I would like to at least finish with him.

Senator METZENBAUM. I have one more question.

The CHAIRMAN. All right. Why don't you finish with him, so he can go back to the Department of Labor, and then we will go to Mr. Ryan.

Senator METZENBAUM. All right. Mr. Salem, as the legal advisor to the Secretary, what is your view regarding the authority under OSHA to disbar members from practicing before the Review Commission?

Mr. SALEM. Senator, I would assume that such authority exists; however, I would be glad to supply a written response to that question, since I am not prepared to discuss it today, since the parameters of this hearing were——

Senator METZENBAUM. Well, hasn't the Solicitor submitted in writing your views—with respect to the administrative law judge, hasn't there been a submission to the administrative law judge of your views in writing?

Mr. SALEM. Which case is that, sir?

Senator METZENBAUM. Well, I think it is a case in which there is some effort to disbar certain members of the bar from practicing before the Review Commission—a very stringent kind of action on your part. As I understand it, you are part of the moving operation in that respect.

In other words, let me ask you another question about it. Are you familiar with a show cause order issued by the Review Commission to a law firm, Tomar, Seliger, Simonoff, Adourian & O'Brien, counsel to the Chemical Workers Association, you were notified in writing by the law firm to that effect on June 9 by express mail.

Mr. SALEM. It sounds as if it is a regional matter, Senator, in one of our 16 regional or subregional offices. In answer to your question, though, no, I have not seen the documents you are referring to.

Senator METZENBAUM. Well, I am concerned that the proceedings are an attempt to stifle attorneys who represent employees in health and safety matters, and I guess I would like to know what do you intend to do about that situation.

I mean, we are not talking about fun and games. We are talking about disbarring an attorney who represents a labor organization, and it sounds to me like a very, very drastic action. The Solicitor's participation, whether over your signature, written by someone else or not, I am concerned about it and want to know what you are going to do about it.

Mr. SALEM. I will commit to you that I will look into the matter, Senator.

Senator METZENBAUM. Well, let me ask you, do you believe it appropriate for the Solicitor or the Department to attempt to disbar persons from practicing before the Review Commission by reason of their advocacy of matters before that Review Commission?

Mr. SALEM. Senator, if it is for reasons of advocacy, and it is purely advocacy in the traditional sense, then I would have concerns, as do you. It would depend upon the facts and circumstances.

Senator METZENBAUM. You do not know anything at all about this case?

Mr. SALEM. No, sir; I do not.

Senator METZENBAUM. Will you let me hear from you promptly with respect to that matter?

Mr. SALEM. Yes, sir.

Senator METZENBAUM. I think, Mr. Chairman, that I would like to hear from Mr. Ryan. I am not sure whether Mr. Salem wants to leave or not, because my whole position on this matter is not at a conclusion. I am still not satisfied with respect to the conflict of interest rules.

As a matter of fact, Mr. Chairman, I think I can say to you now that I strongly believe that the conflict of interest rules have been violated, and I believe that we, having oversight in this area, do have a responsibility. I would suggest, Mr. Chairman, that we jointly request a GAO investigation and report to this committee as to whether in fact there have been any violations of conflict of interest laws or regulations and whether the Federal Advisory Committee Act was violated when the task force met behind closed doors.

The CHAIRMAN. Well, let me take that under advisement. I think what we ought to limit this hearing to whether Mr. Salem is the person who ought to be supported for this position, and I hope we can satisfy your problems here. I think he has done a pretty good job, to be honest with you.

Senator METZENBAUM. Well, the fact is, if he had done a satisfactory job, I would not be asking for the GAO to investigate whether or not——

The CHAIRMAN. Well, let us just understand one thing, Senator Metzenbaum. I have accommodated you on this hearing. I want you to be able to ask any questions you want, and that is legitimate and right. If you differ with Mr. Salem, you have a right to fight him or to vote against him. But this is going to be it, as far as the hearing goes for Mr. Salem.

Senator METZENBAUM. Well, the chairman would certainly agree that——

The CHAIRMAN. I am not saying that the GAO request will not be considered—I will take it under advisement for the future, but I am not going to hold up his nomination anymore. This is an important position. He has the support of both sides, bipartisan support. The Secretary needs him. He has been operating there for months and months——

Senator METZENBAUM. He is not being hindered at all in his responsibilities. He is the Acting——

The CHAIRMAN. Well, all I am saying is I intend to move forward, and I said that when we gave you this hearing. So all I ask is that you just cooperate with me on it.

But the GAO request, I will take under advisement, and if you do find that there is an impropriety here, that is another matter.

Senator METZENBAUM. The chairman has every right to follow such procedures as he deems advisable, and I am sure he would respect the fact that I have every right to follow such procedures as I deem advisable.

The CHAIRMAN. I do, I do. I would be the first to uphold your right on that, as you know, and I have in the past.

Senator METZENBAUM. Mr. Chairman, we will get along.

The CHAIRMAN. We always get along. But I want to be fair to nominees, as I was when Jimmy Carter was President. I did not hold people up where I just had disagreements with them, and philosophical ones at that, for the most part. I cannot recall anybody we held up on that basis.

Senator METZENBAUM. Mr. Chairman, I remember when you were a party with Senator Strom Thurmond to holding up all the judicial nominees after a date-certain, regardless of what merit they had. I had recommended certain persons who were appointed by the President, and without any consideration to the merit or lack of merit, you joined with your colleagues in holding those nominees up.

The CHAIRMAN. Well I do not believe that to be a true statement. I do believe that we did reach an accommodation between Democrats and Republicans in the last month or so before the election as to how many judges we would let through, and we let quite a number through, which is a lot better than what is happening in the Judiciary Committee today, 3 years before this President's term is ending.

Senator METZENBAUM. That occurred in July, when you——.

The CHAIRMAN. The negotiations occurred in July, and the agreement was worked out right before the end of the year. As I recall, we let a whole bunch of people go through.

Senator METZENBAUM. Sure, but as of July, you held them up. I am not suggesting——.

The CHAIRMAN. Well, I did not hold them up.

Senator METZENBAUM. I am not suggesting holding up Mr. Salem. I am just saying that until I am satisfied with respect to the conflict of interest issue, I believe that that is very relevant to his confirmation——.

The CHAIRMAN. Well, will these witnesses here today satisfy you, or what——.

Senator METZENBAUM. I think the GAO can act promptly, Mr. Chairman.

The CHAIRMAN. I do not think they can. I have not seen them act in 1 day or 2, and we are going to have a markup Wednesday morning, and Mr. Salem is going to be on that markup list.

Senator METZENBAUM. Well——.

The CHAIRMAN. Now, my attitude is, unless you can come up with some smoking gun that is a tremendous criticism of Mr. Salem, everybody else is in favor of him.

Senator METZENBAUM. You do not seem to feel, Mr. Chairman, that there is a smoking gun——

The CHAIRMAN. I really do not.

Senator METZENBAUM [continuing]. When a man gives waivers to 12 people——

The CHAIRMAN. Heavens, no. It is done every day in this Government.

Senator METZENBAUM [continuing]. And permitting them to have private meetings; that does not bother you?

The CHAIRMAN. I might differ with him; I might be able to criticize it, as you are doing, and I think that may be legitimate and it may not be. But the point is, you are darned right I do not think that is a reason to hold anybody up.

Senator METZENBAUM. Well, Mr. Chairman, I——

The CHAIRMAN. Now, if there is some reason to show there was an impropriety or some breach of ethics, maybe so, but I do not see any reason here.

Senator METZENBAUM. Mr. Chairman, why don't we wait until tomorrow in order to get into the issues involved as of tomorrow, and then we will worry about that at that point.

The CHAIRMAN. What does that mean?

Senator METZENBAUM. Well, it means that you may very well be in a position to get him out of committee, but I think there is still——

The CHAIRMAN. You mean on Wednesday.

Senator METZENBAUM. Is it Wednesday?

The CHAIRMAN. It is Wednesday, I believe. Well, I am not trying to rush you, Howard. We have had plenty of time here, and I have given you the hearing. I am not trying to be mean about it. It is just that I do not see the justification for foot-dragging on this particular witness who has bipartisan support.

I do not see not cooperating with Secretary Brock, who has done a terrific job down there; even though you might find philosophical disagreements from time to time, he has done a good job trying to keep both sides together, and certainly, almost everybody admits that. I just do not see why we do not get this done.

Now, if there is need to pursue this further, there is no reason why we cannot do so, after he is confirmed. You will have time between the time he is reported out of committee and the time of the floor vote to look into this more.

Senator METZENBAUM. Mr. Chairman, perhaps we can work it out in such a way that we get him out of committee and meanwhile, get the GAO working——

The CHAIRMAN. That may be the answer, but let me look at it. I am not going to be just pushed into that. I mean, I am going to have more than what you have given me here this morning. But go ahead. Maybe I have missed something here.

Mr. SALEM. Mr. Chairman, I will remain for the rest of the hearing, and I am available for any further questions that anyone may have.

Senator METZENBAUM. You have been very patient.

Mr. SALEM. I will be here as long as you wish, Senator.

Senator METZENBAUM. All right. Thank you.

The CHAIRMAN. Well, we appreciate your being willing to stay.

Then, why don't we call on Mr. Ryan at this time?

Mr. Ryan, we welcome you back. We hope everything is going well with you, and it is great to see you.

Mr. RYAN. Thank you.

The CHAIRMAN. Senator Metzenbaum—Howard, let me interrupt you for just one second.

I have to leave in about 5 minutes——

Senator METZENBAUM. I am not going to be very long, and if you have to leave, Mr. Chairman, I will conclude the hearing.

The CHAIRMAN. OK. Then, I will ask Senator Metzenbaum to finish. Let me just say this, that we will put—I invited Mr. Martin to testify, and I apologize for having you come, Mr. Martin—but let me just put his statement into the record so we will have a full record here today.

Senator METZENBAUM. No problem.

The CHAIRMAN. If that is all right, then, you do not have any questions for Mr. Martin?

Senator METZENBAUM. No.

The CHAIRMAN. OK. Then, we will let Mr. Martin go, and without objection, we will put the report into the record, and then we will finish, I take it, with Mr. Ryan, unless you find some other questions you want to ask Mr. Salem today. But I presume you are finished——

Senator METZENBAUM. I do not think so. If I do, I will call him back up.

The CHAIRMAN. You can just call him back up, and Mr. Salem will be glad to answer them.

Do you need Mr. Erlenborn at all? He is back there.

Senator METZENBAUM. No.

The CHAIRMAN. John, we will let you go as a courtesy to you, and I am sorry we have had to inconvenience you here today, but there was just no other choice.

Thank you, sir.

Mr. ERLENBORN. Thank you.

The CHAIRMAN. Well, then the last witness, unless you have further questions of Mr. Salem, will be Mr. Ryan, and that should be short. I will stay as long as I can.

[The prepared statement of Mr. Martin follows:]

FOR RELEASE ON DELIVERY
Expected at 10:00 a.m. EST
June 16, 1986

STATEMENT OF
DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I appreciate the opportunity to testify about my Office's participation in the Department of Labor's issuance of the waivers under 18 U.S.C. § 208(b)(1) to members of the Task Force on Terminations. I would like to make it clear from the beginning that the assistance provided by my Office to the Department of Labor was from my staff attorney, Jane Ley, to two staff attorneys in the Solicitor's office. Such assistance was entirely within the normal procedures of my Office. Neither I nor Ms. Ley have spoken with Mr. Salem on this issue. Before discussing the specific waivers at hand and my Office's participation, I would like to put this issue into perspective by providing you with a brief description of the application of conflict of interest statutes to members of advisory bodies.

Briefly, the executive branch of government uses, as an integral part of administering the laws passed by Congress, numerous advisory committees, commissions and bodies made up of persons from the private sector who may or may not be required to represent a specific interest in performing their duties on the advisory body. If the statute regulation, executive order or charter which authorizes the advisory body specifies that the members of the body must represent certain specified interests, these individuals are considered "representatives" of the non-governmental entities and thus are not covered by any conflict of interest restriction. Their advice is to be weighed accordingly and they are assumed to be advocating a position favorable to their employment and financial ties. If the members of the body are not specifically required by the document authorizing the body to represent specified interests, they serve on the advisory body as "special Government employees" and are covered by the conflict of interest restrictions. Most advisory bodies are made up of special Government employees. More importantly, while they are not required to represent specified interests or an industry, most members of such bodies are selected because of their knowledge of issues to be discussed by the body. Consequently, many of these individuals will not only have knowledge of and expertise in an issue, they will have some financial ties which may be affected by the recommendations of the body.

The basic criminal conflict of interest statute fully applicable to the actions of these special Government employees, as well as full time executive branch employees, is 18 U.S.C. § 208. Briefly, it prohibits an individual from taking any official action which has a direct and predictable effect on a financial interest of his or hers, a spouse, minor

child, partner, organization with whom he or she is serving as an officer, director, trustee, partner or employee, or person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment. There is no de minimis interest concept in this restriction; any interest, however small, is enough to disqualify the individual from taking the action. It is also very broad in terms of its coverage. If an action will have a direct and predictable effect on an entire industry and all will be affected equally, an employee's financial interest in one member of the industry is enough to disqualify him or her. This becomes a very troublesome area for persons who are asked to take action on broad policy issues which have wide-ranging effects.

Because of its breadth, the statute also contains two kinds of waivers. The first, provided for in section 208(b)(1), is the kind that is at issue here. It provides that a written waiver may be granted to an employee or special Government employee so that he or she may participate in those matters specified in the waiver when the individual first discloses the interest and matter to be acted upon, and the appointing authority or appropriate delegate determines that the disclosed interest is not so substantial as to be deemed likely to affect the integrity of the services the individual will provide in the matter. As I mentioned earlier, this must be a written waiver provided individually.

The second kind of waiver in section 208(b)(2) is issued by the agency head to all or certain groups of employees by published regulation which exempts certain interests as being too remote or inconsequential as to affect employees' services. An example of such a waiver is an exemption for holdings in a diversified money market or mutual fund.

In 1978, the Office of Legal Counsel (OLC) of the Department of Justice was asked to opine on the application of section 208 to the actions of special Government employees who were members of advisory bodies and who had interests which might be affected by actions taken by the body. In that published opinion, OLC stated that the restrictions of section 208 would apply to general rulemaking and general policy and noted that "[w]e have consistently interpreted §208(a) to apply to rulemaking proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarily situated will be affected in a like manner."

In speaking to the waiver powers in subsection (b)(1), the opinion goes on to note that a 1963 Presidential Memorandum, regarding the prevention of conflicts of interest on the part of special Government employees, states "'the power of exemption may be exercised . . . if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization.'" This policy has been carried forward in Appendix C to Chapter 735 of the Federal Personnel Manual.

The OLC opinion further states that waivers require a scrutiny of each special Government employee's outside affiliation before determining the advisability of a waiver. "It may also be appropriate in certain cases to tailor the exemption in a way that permits the employee to participate in general policy matters but not in those proceedings which more narrowly affect the organization or firm with which [the special Government employee] is affiliated." It is important to note that OLC felt such waivers had a secondary importance as well because "[t]he process of granting an exemption compels the responsible agency official to focus on the question of the special Government

employee's outside affiliations and to make a specific, written finding with respect to the expected integrity of the individual's services. We may assume as well that this procedure will also have a beneficial effect on the advisory committee member's own perception of his responsibilities."

The Criminal Division of the Department of Justice reviews potential section 208 violations using the standards set forth in this OLC opinion. Therefore, we have consistently advised agencies to focus on this interpretation and to issue such waivers when appropriate. We view the Department of Labor's efforts in this instance as a very prudent and thoughtful attempt to follow the spirit of and the guidance given in this opinion.

With regard to the specific involvement of my Office, an attorney on my staff was first contacted in mid-March by attorneys in the Solicitor's office requesting assistance in determining whether members of the Task Force should be considered special Government employees covered by the conflict of interest statutes, or representatives of certain interest groups which would not be covered. The attorney asked for additional information from the Department of Labor and received it along with a more formal written request for such assistance. Because of that attorney's absence and a need for a timely answer, another attorney, Ms. Ley, reviewed the information, was unable to make a clear determination and made an oral request for more information from the Department. In early April, a member of the Solicitor's staff contacted Ms. Ley and indicated that because it was not immediately clear that the members of the Task Force were "representatives", the Department had decided to take the most cautious route and treat them as special Government employees. The staff attorney indicated the Department intended to request that the members file confidential financial disclosure reports so that their potential conflicts would be known. Ms. Ley suggested that the Department should also consider asking each member whether he or she represented any clients before the Department of Labor and if so on what matters, and if he or she had any clients or associated companies which, to the individual's knowledge, were presently involved in a termination of their pension plans.

In mid-April, the staff attorneys sent to Ms. Ley proposed section 208(b)(1) waivers for some of the members of the Task Force. She telephonically recommended certain changes in the drafts. Thereafter, the DOL attorneys again telephoned her and read the financial disclosures and each individually proposed waiver for about two thirds of the members of the Task Force. She provided suggestions to them as necessary. As the other members of the Task Force filed their disclosures, she has been contacted and the reports and proposed waivers were brought to her to read or were read to her over the telephone for her comment.

These waivers all follow the form supported in the 1978 Department of Justice opinion. The letter including the waiver first describes the restrictions of section 208 and then discusses that a waiver of certain actions is being granted. The waiver specifically states that it extends only to actions on matters of broad policy or general applicability. It further states that it does <u>not</u> extend to actions on matters which have a direct, predictable and unique effect on the employee's interests or those of the other persons or organizations covered by section 208. Finally, each waiver enumerates any additional matters which it does not extend to, depending upon the specific interests disclosed by that individual.

Assuming that the Department did want members of this Task Force to have some expertise or interest in the issue of pension terminations, then the actions taken by the Department in deciding to appoint them as special Government employees, requiring financial disclosure reports, analyzing them and issuing waivers allowing the Task Force members to participate in broad policy issues without fear of criminal sanctions, is not only, we believe, proper and responsible but commendable. We would hope more agencies would assist their advisory group members in understanding the appropriate parameters of their actions as has the Department of Labor in this instance.

I would be happy to answer any questions of the Committee.

STATEMENT OF T. TIMOTHY RYAN, JR., FORMER SOLICITOR, U.S. DEPARTMENT OF LABOR

Senator METZENBAUM. Mr. Ryan, you were former Solicitor of Labor under Secretary Donovan?

Mr. RYAN. That is correct, Senator Metzenbaum.

Senator METZENBAUM. You were the chairman of the task force.

Mr. RYAN. I was chairman of the Termination Reversion Task Force, yes, sir.

Senator METZENBAUM. The Termination Reversion Task Force?

Mr. RYAN. Yes, sir.

Senator METZENBAUM. How did that appointment come about?

Mr. RYAN. I was asked to chair the task force by Assistant Secretary Kass prior to its formation.

Senator METZENBAUM. Do you represent the Washington Business Group on Health and—well, I would just ask that question to begin with.

Mr. RYAN. A partner of mine, Steve Lawton, represents the Washington Business Group on Health.

Senator METZENBAUM. What is the Washington Business Group on Health?

Mr. RYAN. The Washington Business Group on Health is an organization of large corporations with interests in the health benefits area.

Senator METZENBAUM. Did you file an amicus brief on behalf of that organization in the case of *Musto* v. *American General Corporation*?

Mr. RYAN. That is correct, Senator.

Senator METZENBAUM. How long have you or your firm—while you were part of it, that is—represented the Washington Business Group on Health?

Mr. RYAN. I do not know the answer to that question, Senator.

Senator METZENBAUM. You have been involved in it ever since you joined the firm?

Mr. RYAN. I have been back at Pierson, Ball & Dowd for 3 years, and to my knowledge, we have been representing them for about the last year—it could have been longer, though.

Senator METZENBAUM. Are you familiar with page 69 of the task force report which states, quote: "The tax surcharge"—the word "tax" is not there, but I have interposed that in order to make it clear—"The tax surcharge could be used to enhance benefits or set aside to fund future ad hoc COLA's. It was, for example, suggested by several Task Force members that such benefit enhancements include the funding of post-retirement health benefits."

Mr. RYAN. I am familiar with that statement, yes, Senator.

Senator METZENBAUM. Did you suggest that approach?

Mr. RYAN. During our private meetings, at least three individuals on the task force—I was one of them—suggested that we look very closely at utilizing the surcharge for health benefits.

Senator METZENBAUM. As a matter of fact, that does not have anything to do, really, with pension fund termination, does it? It really has to do with your concern about health benefits, not with respect to the pension benefits of the individual.

Mr. RYAN. Senator, we were dealing with an issue of what to do with the surcharge, whether the surcharge should go to the Treasury in the form of an excise tax, or whether it should be returned to the participants and beneficiaries in the form of an enhancement of benefits.

In the context of what alternatives would be available to enhance benefits, the issue of health benefits being an employee benefit came up.

Senator METZENBAUM. Well, actually, is it not fair, Mr. Ryan, for an outsider to conclude that you were instrumental in getting language in this report that did not directly affect the issue of what to do as far as the pensions were concerned, or the pension terminations, but rather, having to do with the creation of a fund and then the use of those funds for health benefits, and those health benefits are nowhere else mentioned in this task force report; and in fact, it does help the concerns of the Washington Health Group?

Mr. RYAN. I guess two responses, Senator. One is, as I said before, we were looking at that issue only in the context of enhancing benefits, and we looked at the full array of benefits, not only pension but health.

As to the second issue of the Washington Business Group on Health's position, I have never met with that group; I have never talked with any individual who is a member of that group; and, my participation has been in one amicus case, totally in our office involving conversations with my partner, who represents WBGH.

I have never discussed the issue of the termination task force with him. I have never discussed the issue of utilizing health benefits as an enhancement with WBGH. So I do not know what their position is on that issue, Senator.

Senator METZENBAUM. But whether you discussed it with them or not, is it not interesting to you that in this one place, the use of these funds and the concern that is expressed throughout the entire creation of the task force and those who are involved with it, having to do with pension benefits, the report in one instance reaches out and talks about postretirement health benefits, the funding of postretirement health benefits?

Mr. RYAN. Senator, some of us were concerned—I think as will be exhibited in the Advisory Council report, which we are now finalizing—with where the surcharge goes, whether the surcharge goes to the FISC, or whether it would be returned to participants.

I recently voted in the Advisory Council meeting to return the surcharge to participants in the form of enhanced benefits, and it is my view that when the administration receives our report, hopefully they will review the entire array of benefits that may be available as far as enhancements are concerned. In that context, I believe health benefits is one area where they should be looking; I think others on the task force share that view.

Senator METZENBAUM. You do not think they ought to just be looking at the—there is a question. The funds are created for pensions.

Mr. RYAN. Yes, sir.

Senator METZENBAUM. Pensions are different than health benefits. The reason for my making the inquiry of you is that the report

went off the parameters to reach out and talked about health benefits.

Of course, we are all concerned about health benefits for retirees. We are concerned about medical benefits. We are concerned about what they get in their pension. We are concerned about how they can live, with perhaps even housing benefits.

But the fact is, this task force was supposed to be concerned just about pension benefits, broad dollars, how much they get and whether or not the terminations are depriving them of adjustments in those benefits as inflation continues to whittle away at those benefits.

Did you say you were the one who suggested that this language be included, or——

Mr. RYAN. The staff of the Labor Department which assisted us in drafting the language included that language in the report, because it accurately reflects a number of discussions that the task force had with regard to enhancement of benefits.

Senator METZENBAUM. I have no further questions, Mr. Ryan. Thank you for appearing.

Mr. RYAN. Thank you.

Senator METZENBAUM. Thank you, Mr. Ryan.

[Responses by Mr. Salem to questions by Senator Metzenbaum follow:]

ORRIN G. HATCH, UTAH, CHAIRMAN
ROBERT T. STAFFORD, VERMONT
DAN QUAYLE, INDIANA
DON NICKLES, OKLAHOMA
PETE V. DOMENICI, NEW MEXICO
PAUL LAXALT, NEVADA
STROM THURMOND, SOUTH CAROLINA
LOWELL P. WEICKER, JR., CONNECTICUT
MALCOLM WALLOP, WYOMING
CHARLES E. GRASSLEY, IOWA
EDWARD M. KENNEDY, MASSACHUSETTS
CLAIBORNE PELL, RHODE ISLAND
HOWARD M. METZENBAUM, OHIO
SPARK M. MATSUNAGA, HAWAII
CHRISTOPHER J. DODD, CONNECTICUT
PAUL SIMON, ILLINOIS
JOHN F. KERRY, MASSACHUSETTS
RONALD F. DOCKSAI, STAFF DIRECTOR
KATHRYN O'L. HIGGINS, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510

April 28, 1986

RECEIVED
APR 30 10 23 AM '86
OFFICE OF THE SOLICITOR

The Honorable George R. Salem
Acting Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-2002
Washington, D.C. 20210

Dear Mr. Salem:

I congratulate you on your nomination to the post of Solicitor of Labor, and look forward to working with you and your office.

I have some concerns regarding the Department's understanding and enforcement of conflict of interest rules. In your capacity as Acting Solicitor I am certain that you are familiar with applicable law in this area. Therefore, I have enclosed some written questions.

Very sincerely yours,

Howard M. Metzenbaum
United States Senator

Enclosures
HMM/dsj

cc: The Honorable Orrin Hatch, Chairman
The Honorable Edward Kennedy, Ranking Member

QUESTIONS SUBMITTED TO GEORGE R. SALEM
NOMINEE TO THE OFFICE OF SOLICITOR OF LABOR
BY SENATOR HOWARD METZENBAUM

1. Please provide me with copies of Department rules and regulations governing conflict of interests by Department employees and members of task forces and advisory committees.

2. Please describe the role and the specific activities of the Solicitor's office in educating persons governed by these rules and regulations.

3. Please describe the role of the Solicitor's office in enforcing these rules and regulations.

4. Does the Solicitor's office issue advisory opinions or memoranda to the Secretary and other employees regarding conflicts of interest? If so, describe these activities and provide copies of such documents prepared in the last twelve months. Please describe any Department authority that resides outside the Solicitor's office in enforcing and administering conflict of interest rules and issuing opinions or memoranda regarding them.

5. Does the Solicitor's office issue waivers or offer opinions or recommendations regarding waivers from conflict of interest rules? If so, please provide copies of all such waivers, opinions, and recommendations issued during the last five years. Please describe any Department authority that resides outside the Solicitor's office in issuing waivers or offering opinions or recommendations regarding waivers from conflict of interest rules.

6. Please describe the PBGC Advisory Committee and the role of Mr. Roger Martin. Please provide any conflict of interest disclosures filed by and any written material (including memoranda and advisory opinions) on possible conflict of interests regarding Mr. Martin or and other member of the Advisory Committee. Please provide a description of Mr. Martin's employment outside the Department since he became a member of the Advisory Committee. Has Mr. Martin engaged in any activities as a member of the Advisory Committee, relative to the issue of privatizing the PBGC's insurance function? Please describe these activities, if any. Could Mr. Martin's business activities profit in any way if the PBGC insurance activities were turned over to the private sector? In your opinion, as Acting Solicitor, do Mr. Martin's business activities present any conflicts of interest? Please explain. Have you had any discussions with any person regarding this subject? If so, please provide a detailed description of each discussion.

63-114 0 - 86 - 3

7. Please provide me with copies of the relevant regulations and rules governing the establishment and functioning of advisory committees, task forces, and any other similar bodies. Under what circumstances can meetings of these bodies be closed to the public? What requirements are there for public notice of their meetings? What requirements are there for maintaining minutes or transcripts of meetings? What conflict of interest rules govern such bodies? Would participation of a member of an advisory committee or task force in an issue in which the participant has or had a business interest, either direct or indirect, including client representation interests, violate any conflict of interest rule or regulation? Please explain in detail your reasoning and cite appropriate precedent. When must conflict of interest forms be filed by members of such bodies and where are they filed?

8. There currently exists an advisory task force looking into the issue of pension plan terminations. Please describe the process used in formulating this task force. Please provide a list of meeting dates and locations of this task force. Please provide copies of all public meeting notices. Please provide a copy of all conflict of interest disclosure forms filed by members of the task force and the date which they were filed with the Department. Please provide copies of minutes and transcripts of the task force meetings. Has the Solicitor's office prepared any opinions or memoranda regarding the formation of, operation of, or any other issue regarding this task force? Please provide copies of any relevant material.

In your opinion as Acting Solicitor, were there any violations of rules or regulations relative to the creation or functioning of this task force? Do you believe that there are any violations of conflict of interest rules and regulations?

Have you had any discussion with any person regarding this subject? If so, please provide a detailed description of the conversation.

Please provide a list of all advisory task forces and committees that have been created under the authority of the Department of Labor. Are there any current plans to create additional advisory committees or task forces? Please explain.

9. Section 411 of the Employee Retirement Income Security Act (ERISA) prohibits any person convicted of certain enumerated crimes from acting as a plan administrator, fiduciary, trustee, or consultant during five years after such conviction. Please describe your understanding of the law and the procedures used to disqualify a corporation. Please describe in detail any activities under Section 411 regarding E.F. Hutton.

Please provide your legal opinion as to whether E.F. Hutton should be disqualified under Section 411. Why or why not. Have you been involved in any conversation regarding this issue? Please provide a detail description of any such conversation. Has the Solicitor's office prepared any material regarding this issue? If yes, please provide copies of all material.

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

May 7, 1986

Honorable Howard M. Metzenbaum
United States Senate
140 Senate Russell Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

I am enclosing responses to questions you have posed in connection with the Senate's consideration of my nomination as Solicitor of Labor.

Please feel free to call upon me if I can be of further assistance.

Sincerely,

George R. Salem
Deputy Solicitor

Enclosures

(Editor's Note: In the interest of economy, due to the voluminous content of the material in question, Enclosures A-K as referred to by Mr. Salem in his responses were retained in the files of the committee.)

Q. Please provide me with copies of Department rules and regulations governing conflicts of interest by Department employees and members of task forces and advisory committees.

I am enclosing copies of Department of Labor conflict of interest rules and regulations applicable to Department of Labor employees, including those employees who serve on advisory bodies. I am also enclosing copies of various instructions which have been issued by Department of Labor agencies. (See Enclosure A)

Q Please describe the role and the specific activities of the Solicitor's Office in educating persons governed by these rules and regulations.

The Solicitor's Office maintains a very active program to inform employees concerning the meaning of applicable law and regulation. Under the Department of Labor's Ethics and Conduct regulations, the Solicitor is the Ethics Counselor to the Department. Certain other Solicitor's Office personnel serve as Deputy Counselors and are available in Washington and in each regional office to consult personally and informally with employees concerning any questions they may have. Solicitor's Office personnel have also consulted frequently with supervisory officials concerning the appropriate handling of their managerial responsibilities in the area of ethics and conduct. As a consequence of the Solicitor's

role as Designated Agency Ethics Official under the Ethics in Government Act, our Office has provided extensive counseling of current and former employees concerning the post-employment conflict of interest requirements. The time and effort spent in these informal consultations is considerable.

We also have engaged in more formal training efforts. We have conducted various programs with the Department's top staff to brief them concerning the requirements of the ethics rules. During pre-election periods, we have briefed them concerning political activity restrictions and the campaign laws. One of our experts conducted a session last year to brief those involved in reviewing financial disclosure forms submitted under the Ethics in Government Act. We anticipate another such session this year. From time to time we are requested by various agencies within the Department to conduct or participate in briefing sessions of their top staff, including, at times their regional officials.

During the past year, we worked closely with the Office of the Inspector General to develop a training course

primarily aimed at supervisory employees. This course, jointly sponsored by the Inspector General and the Assistant Secretary for Administration and Management, dealt with ethics, internal control issues, whistleblowing and other matters relating to the responsibilities of the Inspector General. The morning session of this 5-hour course was principally devoted to ethics matters. Ten sessions of this well-attended course were conducted between November 1984 and December 1985, and I am informed that over 200 employees were trained. Solicitor's Office personnel participated as panelists in all sessions and provided the principal expertise on ethics and conduct issues.

Following the conclusion of this course, Solicitor's Office staff has been working with the Office of the Assistant Secretary for Administration and Management to develop a new course, sponsored and conducted by the Office of the Solicitor. This course will deal primarily with ethics and conduct issues. We have asked the Office of the Inspector General to provide a panelist to participate in these sessions, and it has agreed to do so. Arrangements for this series of sessions are nearly complete, and we anticipate that they will begin in the near future.

From time to time we also make certain written materials available to highlight the ethics program. We are continuing to distribute to the Department's SES officials and others involved in the ethics program, copies of the Ethics Newsgram, a publication of the Office of Government Ethics. From time to time we notify DOL agencies concerning training courses which are being offered by the Office of Government Ethics. At our recommendation, on March 11 of this year, Secretary Brock transmitted a memorandum to all employees of the Department of Labor highlighting the importance of employee compliance with ethical conduct standards.

The Solicitor's Office also, from time to time, prepares written advisory opinions. This matter will be dealt with in connection with your Question 4.

I strongly believe that the various informational efforts in which we engage are a very important part of the Department's ethics program.

Q Please describe the role of the Solicitor's Office in enforcing these rules and regulations.

Please describe any Department authority that resides outside the Solicitor's Office in enforcing and administering conflict of interest rules and issuing opinions or memoranda regarding them.

The Solicitor's Office performs a wide variety of activities in connection with the enforcement of the Department's ethics and conduct program. Under the Department's Ethics and Conduct regulations, the administrators of the Department's principal agencies have been delegated responsibility with respect to the application of conduct standards to employees within their jurisdiction. They are required to consult with the Solicitor, as appropriate. The Solicitor's Office provides extensive consultation services.

The Inspector General has responsibility to investigate certain misconduct matters. The Solicitor's Office provide independent legal counsel to assist the IG in carrying out his responsibilities. The Solicitor's Office refers possible violations to the IG or DOL agencies, as appropriate.

Agency responsibilities include the review of most confidential disclosure statements filed pursuant to E.O. 11222 and the Department's regulations. The Solicitor, however, has a role in the resolution of conflict issues which may arise in connection with the review process.

DOL agencies are given the authority, with the approval

of the Solicitor, to impose additional standards and procedures, consistent with our ethics regulations and to modify, with the Solicitor's approval, the list of those positions whose incumbents are required to file confidential financial disclosure forms.

In connection with the responsiblities of the DOL employing agencies in applying the conduct standards to their employees, these agencies may make determinations on the application of conduct standards and issue waivers, with appropriate assistance from the Solicitor's Office, issue advice to their employees, and provide guidance and training.

Apart from the application of the ethics program within the Office of the Solicitor, the Solicitor also makes efforts to assist in assuring Department-wide compliance. It provides the Secretary with advice, assistance, and recommendations. It provides liaison with the Office of Government Ethics in connection with matters arising under the ethics program.

As the Deisgnated Agency Ethics Official under the Ethics in Government Act, the Solicitor, in addition to his advisory

functions, is responsible for the administration of the public financial disclosure program. While the Solicitor reviews some public financial disclosure forms, responsibility for review has generally been delegated to major program heads. The Assistant Secretary for Administration and Management has also been delegated certain administrative responsibilities with respect to the operation of the program. In the event of a violation of the post-employment restrictions, the Solicitor has an enforcement role under our regulations with respect to the imposition of civil sanctions under the Ethics in Government Act. The Solicitor considers allegations of violations and issues notices of alleged violation which are subject to review by an administrative law judge and the Under Secretary.

Q Does the Solicitor's Office issue advisory opinions or memoranda to the Secretary and other employees regarding conflicts of interest? If so, describe these activities and provide copies of such documents prepared in the last twelve months (see Enclosure B).

From time to time, the Solicitor's Office issues written opinions or memoranda interpreting the provisions of the conflict of interest laws and regulations, including the post-employment conflict of interest laws. In appropriate

cases we consult with the Office of Government Ethics. I am enclosing copies of such memoranda prepared within the past twelve months. In some cases, identifying information has been deleted in order to protect personal privacy.

Q Does the Solicitor's Office issue waivers or offer opinions or recommendations regarding waivers from conflict of interest rules? If so, please provide copies of all such waivers, opinions, and recommendations issued during the last five years. Please describe any Department authority that resides outside the Solicitor's Office in issuing waivers or offering opinions or recommendations regarding waivers from conflict of interest rules.

Under section 504 of Executive Order 11222, the Secretary has been delegated authority to provide waivers with respect to Presidential appointees within the Department of Labor. As indicated above principal Departmental officials have been delegated authority and responsibility to apply the conduct standards to their employees, with appropriate advice from the Solicitor. Thus, they have authority to issue waivers to employees within their jurisdiction. The Solicitor, of course, would be responsible for the issuance of waivers with regard to employees of the Solicitor's Office. To my knowledge, drafts of all waivers previously issued by Department officials have been prepared in the Office of the Solicitor. I have asked my staff to gather

all waivers issued by Department officials within the last five years and am enclosing copies of these documents (see Enclosure C).

Q Please describe the PBGC Advisory Committee and the role of Mr. Roger Martin. Please provide any conflict of interest disclosures filed by and any written material (including memoranda and advisory opinions) on possible conflict of interests regarding Mr. Martin or any other member of the Advisory Committee. Please provide a description of Mr. Martin's employment outside the Department since he became a member of the Advisory Committee, relative to the issue of privatizing the PBGC's insurance function. Please describe these activities, if any. Could Mr. Martin's business activities profit in any way if the PBGC insurance activities were turned over to the private sector? In your opinion, as Acting Solicitor, do Mr. Martin's business activities present any conflicts of interest? Please explain. Have you had any discussions with any person regarding thise subject? If so, please provide a detailed description of each discussion.

The Solicitor of Labor does not administer the ethics program with respect to employees of the Pension Benefit Guarantee Corporation. The PBGC has its own Designated Agency Ethics Official under the Ethics in Government Act, its own ethics regulations, and its own agency ethics counselor. Accordingly, I have referred your question to the General Counsel of the PBGC for a response.

I do not recall any conversations concerning the questions you have raised.

Q Please provide me with copies of the relevant regulations and rules governing the establishment and functioning of advisory committees, task forces, and any other similar bodies.

I am enclosing copies of GSA and Department of Labor regulations governing advisory committees (see Enclosure D).

Q Under what circumstances can meetings of these bodies be closed to the public? What requirements are there for public notice of their meetings? What requirements are there for maintaining minutes or transcripts of meetings?

At the outset, it should be noted that the Federal Advisory Committee Act (FACA) and its implementing regulations provide extensive requirements concerning the formation and conduct of covered advisory bodies. In National Anti-Hunger Coalition, et al. v. Executive Committee of the President's Private Sector Survey on Cost Control, et al., 711 F.2d 1071 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia held that certain bodies were outside the scope of FACA and accordingly were not subject to its requirements.

Under FACA and its implementing regulations, there must be a Federal Register notice of the meeting of advisory committees 15 days in advance of the meeting. In addition,

where practicable, information concerning the holding of the meeting should be sent to interested individuals and organizations. In emergency situations, the 15-day advance notice requirement may be diminished, and advance notice may be waived in national security situations. The form of the notice has been specified and must include, among other information, a description of the extent to which the meeting is closed to the public and the legal basis for such action.

The Act and regulations require that detailed minutes of each advisory committee meeting must be kept, including the information set forth in section 1612 of the enclosed Department of Labor issuance.

Q What conflict of interest rules govern such bodies? Certain persons who serve on advisory bodies may be deemed to be Federal employees. These individuals are fully subject to the conflict of interest laws (18 U.S.C. 201-209) and the Department of Labor standards governing employee conduct. Other individuals who serve on such bodies may not be deemed employees of the Government and would therefore not be subject to these standards. The Office of

Government Ethics issued a memorandum on July 9, 1982 setting forth criteria for determining when a member of an advisory body is an employee. It should be noted that members of advisory bodies are frequently appointed as "special government employees," as defined in 18 U.S.C. 202. these employees are subject to lesser restrictions under certain provisions of the conflict of interest statutes than are applied to "regular" government employees.

Q Would particpiation of a member of an advisory committee or task force in an issue in which have the requisite the participant has or had a business interest, either direct or indirect, including client representation interests, violate any conflict of interest rule or regulation? Please explain in detail your reasoning and cite appropriate precedent.

In answering these questions, consideration must be given to 18 U.S.C. 208, 203, and 205 and the Department's Ethics and Conduct regulations.

If a member of an advisory body, task force, etc., is deemed to be an employee, he or she would be subject to the conflict of interest laws and regulations. Among these provisions is 18 U.S.C. 208. In the absence of a waiver or exemption under section 208(b), this section, in general, provides that an employee (including a special

government employee) may not participate personally and substantially in particular matters which affect his or her own financial interests, those of a spouse, minor child, partner, the interests of any organization in which he or she serves as an employee or holds certain leadership positions, or the interests of anyone with whom the employee is negotiating or has any arrangement concerning prospective employment. The statute has been interpreted to apply to direct and predictable impacts (see Memorandum Opinion for the Chief Counsel, Food and Drug Administration, dated June 29, 1978, by John M. Harmon, Assistant Attorney General, Office of Legal Counsel).

It is possible, though not inevitable, that government actions which impact on an employee's clients would thereby impact on the employee's financial interests or the other related interests which are specified in section 208.

In addition, for the statute to apply, the other statutory requisites must be met. the employee must know of the interests. The participation must be personal and substantial. The actions must be in relation to a "particular matter." The meaning of the word "particular" is not free from

doubt. For example, in the Office of Legal Counsel memorandum to which I have referred, Mr. Harmon states:

> As an initial matter, some confusion regarding the scope of 208(a) may arise because of the use of the word "particular." It is our understanding that the word "particular" was included to make clear that an individual would not be disqualified from an entire range of activities merely because he might have a financial interest in a certain decision, proceeding, transaction, or recommendation arising within that area or range; disqualification is only required in the "particular" matter, not as to the entire area or range. Cf., Hearings on Federal Conflict of Interest Legislation before Subcommittee No. 5 of the House Judiciary Committee, 87th Cong., 1st Sess. 38 (1961).

If a proposed course of conduct is covered by the statute, an advance written waiver may, nevertheless be obtained under the circumstances set forth in 208(b). In addition, agencies may, by regulation, provide for statutory exemptions. The Department of Labor has issued such an exemption in section 12(c) of its regulations. the exemption reads as follows:

> In accordance with the provisions of section 208(b)(2), the financial interests described below are hereby exempted from the prohibition of 18 U.S.C. 208 as being too remote or too inconsequential to affect the integrity of an employee's services in a matter: the policy holdings in an insurance company and the stock or bond holdings, in a mutual fund, investment

> company, or bank which owns an interest in an entity involved in the matter: Provided, that in the case of a mutual fund, investment company, or bank the fair value of such stock or bond holding does not exceed 1 percent of the value of the reported assets of the mutual fund, investment company, or bank.

You also ask whether the statute would apply if the employee's participation was in relation to a former business interest. If no financial interest whatever exists at the time of the employee's official actions, the statute is not applicable. The use of the present tense in the phrase, "has a financial interest," in section 208(a) indicates that the financial interest must be current at the time of the employee actions. In our view, reading the statute in this literal way is obligatory, especially in light of the canon of construction that criminal statutes be narrowly construed.

While the statute is inapplicable, there still may be circumstances in which an employee's actions in relation to past financial interest may raise questions under applicable ethics and conduct regulations.

In answering your inquiry, I must also consider the possible relevance of 18 U.S.C. 203 and 205. These provisions limit the ability of current government employees to engage

in representational actions before courts or Federal agencies and restrict the receipt of compensation for representational services performed before the government in certain matters.

You have asked whether particpiation in a government matter in which the employee has a business interest would violate conflict of interest restrictions. If the business interest in question involved representation before the courts or Federal agencies in relation to certain matters in which the government is interested or if it involved receipt of compensation in relation to certain agency representation, sections 203 or 205 may be applicable.

As I have indicated, where members of advisory bodies are made employees of the government, they are ordinarily appointed as special government employees. Special government employees are barred under section 205 from representing private interests before a court or Federal agency in relation to a particular matter involving a specific party or party in which the employee participated personally and substantially as a government official. this prohibition applies where the government is a party or is interested in that matter. If the "business interest" referred to

in your question involves representation in relation to a particular matter involving a specific party or parties in which the employee was involved as a member of the advisory body, there could be a violation of section 205. Under section 203 similar questions are raised in connection with receipt of compensation for representational activities. I should also note that special employees are also barred from representing anyone before the agency in which they are employed if their government service exceeds 60 days in a 365 day period.

Finally, I would note that with respect to either current or former financial interests, even if the conflict of interest statutes are held to be inapplicable to the particular situation, it is still possible that employee actions could contravene applicable conduct regulations, including the proscription that employees avoid apparent conflicts of interest. The possible applicability of these regulations would depend on the particular circumstances of each case.

Q When must conflict of interest forms be filed by members of such bodies and where are they filed?

First, under Title II of the Ethics in Government Act, any federal employee, including a special government employee,

paid at or above GS-16, or the equivalent, must comply with the public financial disclosure reporting requirements of the Act when he or she performs his or her duties for more than sixty days in any calendar year. This would include any members of advisory committees who have been determined to be special government employees serving at the appropriate grade levels for the requisite number of days. However, advisory committee members rarely perform duties for more than sixty days per calendar year. Such public disclosure reports would be filed either with the Labor Department agency in which the advisory body is located or, in the case of bodies located in the Office of the Secretary, they would be filed with the Assistant Secretary for Administration and Management.

Second, Title II of the Ethics in Government Act also requires certain individuals engaged in "support" of an advisory committee to file public financial disclosure reports without regard to the individual's status as a special government employee. However, this requirement only applies if the individual is working in support of an advisory body that is itself composed at least in part of special government employees, the individual is reasonably expected to perform duties for more than sixty days in a calendar year, and the individual's duties are determined by the Office of Government Ethics to be equal to

or greater than those requiring a basic rate of pay at the GS-16 level or above. (See 5 CFR 734.202(h)).

Third, with respect to advisory committee members who are determined to be special government employees, but who are not subject to the public financial disclosure reporting requirements of the Ethics in Government Act, under the Department's regulations, such special government employees are generally required to file confidential statements of employment and financial interests with the head of the employing administration, bureau or office.

Q There currently exists an advisory task force looking into the issue of pension plan terminations. Please describe the process used in formulating this task force.

Has the Solicitor's Office prepared any opinions or memoranda regarding the formation of, operation of, or any other issue regarding this task force? Please provide copies of any relevant material.

Have you had any discussion with any person regarding this subject? If so, please provide a detailed description of the conversation.

I am enclosing an exchange of correspondence between Dennis Kass, Assistant Secretary for Pension and Welfare Benefits Programs, and Chairman Roybal of the House Select Committee on Aging and correspondence between Mr. Roger Thomas,

Counsel to the Committee, and me. This correspondence discusses the process by which the Task Force was formed and discusses issues related to the application of FACA to Task Force activities (see Enclosure E). The Solicitor's Office was extensively involved in the preparation of the correspondence relating to Task Force matters. The correspondence also raises questions relating to conflict of interest matters.

It would be useful to provide further background concerning these matters. At the outset, it was our view that members of the ERISA Advisory Council, including those council members who were participants in the Advisory Council's Task Force on Terminations, were Federal employees for the purposes of the conflict-of-interest laws and regulations. On the other hand, we were uncertain whether members of the Task Force, who were not also members of the Advisory Council would be deemed Federal employees for these purposes. It was unclear whether these individuals met the criteria for determining employee status described by OGE in its July 9, 1982 memorandum. Accordingly, on February 10, 1986, I transmitted to Assistant Secretary Kass a memorandum attaching two draft documents. The first was a memorandum to

all Advisory Council members and the second was to be sent to Task Force members who were not members of the Advisory Council. The memorandum to Council members set forth our belief that they were Federal employees and requested financial information for the purposes of determining whether a conflict-of-interest waiver was appropriate. Mr. Kass sent requests out on February 13, 1986. Responses from Council were, for the most part, not forthcoming. Accordingly, On March 27, 1986 I directed a memorandum to Council members stating that those who wished to continue their membership on the Council must provide the necessary financial information immediately.

With respect to the Task Force members, Mr. Kass and I also agreed that financial information would be requested and consideration would be given to the issuance of a waiver. This was done even though we were uncertain whether these individuals were Federal employees. It was done in order to avoid the delays incident to a determination as to the employment status of these individuals and at the same time as an exercise of caution to assure that conflict of interest situations would be avoided. I am enclosing a copy of my transmittal memorandum to Mr. Kass,

as well as the memoranda which were sent to the Council and Task Force members (see Enclosure F).

Subsequent to the issuance of the memoranda to Task Force members, it was clear that there was considerable reluctance on the part of these members to supply financial information. Some members expressed the view that they were not Federal employees and they therefore saw no need to submit the data. Accordingly, Assistant Secretary Kass requested that I obtain a determination from the Office of Government Ethics as to whether these individuals were Federal employees for the purposes of the conflict-of-interest laws. Mr. Kass sent to my office two memoranda bearing on this issue. On March 28, I sent to Mr. David Martin, Director of OGE, a letter requesting an opinion and enclosing Mr. Kass's memoranda and other materials. I am enclosing copies of these documents for your reference (see Enclosure G).

My staff had begun the process of making contacts with OGE staff and furnishing it with information relevant to a determination. I was uncertain as to the time it would take for a final decision to be reached, and I was aware of Mr. Kass's desire for these matters to be resolved

as expeditiously as possible. Accordingly, shortly after the transmission of my letter to Mr. Martin, I recommended to Mr. Kass an approach which I believed to be both expeditious and appropriate. I recommended that Task Force members be officially appointed as special government employee consultants to the Department. Such an approach would assure that members would henceforth be Federal employees and subject the conflict of interest laws. We could then proceed to gather the necessary financial information and consider the appropriateness of waivers. Mr. Kass agreed to this recommendation. My staff then notified OGE as to our proposed course of action and indicated that further action on my letter to Mr. Martin was unnecessary. Accordingly, on April 14, 1986, I transmitted to Task Force members who were not also members of the Advisory Council, a memorandum indicating our intention that they be apointed as unpaid consultants and requesting the submission of financial data. This memorandum was sent to those who had not previously furnished financial information. I am enclosing copies of this memorandum (see Enclosure H).

Two other substantive matters should be referenced. The first relates to the extent of financial disclosure requested

from Advisory Council and Task Force members. Initially, we had requested disclosure comparable in large part to that which is furnished by employees subject to the Ethics in Government Act. Subsequently, based on further discussions between my staff and staff at OGE, we were satisfied that it would be appropriate in considering whether to issue waivers, to request completion of Department of Labor Form 1-264 (relating to special government employees) and to request that certain additional information be furnished, as set forth in my memorandum of April 14, 1986.

Secondly, in his letter to me of March 24, 1986, Mr. Roger Thomas made reference to conversations with me concerning conflict-of-interest issues relating to the Task Force. As Mr. Thomas indicates, on March 21, I stated my intention to assure that the Task Force would not meet until we had determined the steps we should take to avoid conflicts-of-interest. My letter of April 7, 1986 followed up this conversation. Subsequently, on April 28, I informed Mr. Thomas by phone indicating that we were appointing members as consultants, that we had considered the financial information which had been submitted, that we were issuing appropriate waivers, and that the Task Force was scheduled to meet on April 30.

Finally, with regard to your question on my conversations conerning this matter, I would just add the following. Apart from the conversations I have referenced in this memorandum, I, of course, had a variety of conversations concerning these matters with Mr. Kass, staff, and others. I did not keep a written record of these conversations, and regret I am not in a position to provide you with a totally comprehensive summary of all of my conversations.

Q In your opinion a Acting Solicitor, were there any violations of rules or regualtions relative to the creation or function of this task force? Do you believe that there are any violations of conflict of interest rules or regulations?

Based on information that has been conveyed to me during my consideration of these matters, I have no reason to believe that the creation or operation of this Task Force has violated rules or regulations or that members have violated applicable conflict of interest standards.

Q Please provide a list of meeting dates and locations of this task force. Please provide copies of all public meeting notices.

I am enclosing a list of meeting dates and locations as well as copies of public meeting notices (see Enclosure I).

Q Please provide a copy of all conflict of interest disclosure forms filed by members of the task force and the date which they were filed with the Department.

I am enclosing in Enclosure J a list of task force members and the dates on which they filed financial information. I regret that I am not in a position to provide the financial information filed by these individuals. Many of the filers submitted Department of Labor Form 1-264, the confidential disclosure form. These forms are afforded a high degree of confidentiality under the Department's regulations. Section 23 provides that the Department shall hold each statement of employment and financial interests in confidence. It provides that no information from such a statement may be disclosed outside the Department of Labor, except as the Secretary or OPM may determine for good cause shown. Moreover, in Mr. Kass's initial memoranda to members, he assured them that the information requested would not be regarded as a public financial disclosure report. More broadly, the information submitted by these individuals is of a highly personal nature. I recognize the interest that you have in assuring that the Department is carrying out its responsibilities and that the individuals concerned have complied with their obligations to avoid conflict with applicable rules governing ethical conduct. After carefully considering these matters, I do not believe

it would be appropriate to furnish the requested material at this time.

Q Please provide copies of minutes and transcripts of the task force meetings.

Your request has been discussed with Mr. Kass. Copies of these minutes will be submitted to you as soon as copying can be completed by staff assisting the Task Force.

Throughout the functioning of this Task Force, we have made strenuous efforts to assure that the Task Force functions in accordance with its mandate to serve the Advisory Council and not render advisory services to the Department. It is our desire that this orderly process continue. Accordingly, we request that these minutes not be made publicly available until the Task Force has reported to the Advisory Council.

Q Please provide a list of all advisory task forces and committees that have been created under the authority of the Department of Labor. Are there any current plans to create additional advisory committees or task forces? Please explain.

I am enclosing a list of advisory bodies which has been furnished to me by Department officials who keep the records on such matters (see Enclosure K). In addition, it has very recently been brought to my attention that the Employment and Training Administration has established two advisory bodies, a State Employment Security Agency Administrative Financing Roundtable and a Consultation Group on the Review

of the Employment Service. It is my view that these two groups do not comply with the requirements of FACA. Our office has advised accordingly.

The Department of Labor is greatly interested in the views of those who may be affected by its actions. In an effort to obtain such information, program officials may well wish to consider the establishment of various advisory bodies. The Solicitor's Office is not at this time contemplating the establishment of an advisory body to assist it in the conduct of its responsibilities. You may wish to contact other officials of the Department concerning future actions to which they may be giving some thought.

Q Section 411 of the Employee Retirement Income Security Act (ERISA) prohibits any person convicted of certain enumerated crimes from acting as a plan administrator, fiduciary, trustee or consultant during five years after such conviction. Please describe your understanding of the law and procedures used to disqualify a corporation.

The Labor Racketeering Amendments in the Comprehensive Crime Control Act of 1984 amended section 411 of the ERISA to establish a debarment period of 13 years unless the sentencing judge sets a lesser period of at least three years. For an individual, as opposed to a corporation or a partnership, the debarment is automatic. The individual's

only recourse is to apply to the U.S. Parole Commission for a certificate of exemption. A corporation convicted of one of the enumerated crimes, however, cannot be debarred without a prior hearing and determination by the Parole Commission that the corporation's service in a given capacity would be inconsistent with the intention of section 411. I should mention that, effective November 1 of this year, the role of the Parole Commission will be replaced by that of the sentencing judge or, under some circumstances, the federal district court for the district in which the offense was committed.

Although this dichotomy between the treatment of individuals and the treatment of corporations under section 411 dates back to enactment of ERISA in 1974, the Department of Justice informs us that the procedures for disqualification of a corporation have never been used. The Parole Commission has issued detailed regulations on its procedures with regard to individuals seeking certificates of exemption, but there are no regulations on the procedures to be used for corporations.

In exemption proceedings, for which there is administrative precedent, the Commission considers three factors: the

nature of the disqualifying offense (including its severity and the extent to which its commission suggests a likelihood that the perpetrator would abuse a position of trust with a plan), the nature of the position for which a certificate of exemption is sought, and evidence of rehabilitation on the part of the debarred individual. It is important to emphasize that, in any event, no single factor is determinative.

Q Please describe in detail any activities under section 411 regarding E.F. Hutton.

E.F. Hutton and Company, Inc., was convicted on May 2, 1985, upon a plea of guilty, of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. These crimes are expressly mentioned at section 411 in the list of disqualifying crimes, as "a violation of chapter 63 of title 18," of the United States Code.

Although as a matter of policy the Department of Labor does not acknowledge the existence or status of ongoing investigations, E.F. Hutton has disclosed that the Department is investigating whether the company should be debarred

under section 411. Given this public disclosure, I can confirm that such an investigation is in progress but I am not prepared to discuss any details of the investigation.

Q Please provide a legal opinion as to whether E.F. Hutton should be disqualified under section 411. Why or why not.

Because the Department's investigation of this matter is not complete, a legal opinion on whether E.F. Hutton and Company, Inc., should be debarred under section 411 would be premature.

Q Have you been involved in any conversations regarding this issue?

I have not been involved in any conversations concerning the debarment of corporations in general or the E.F. Hutton matter in particular.

Q Has the Solicitor's Office prepared any material regarding this issue?

To the best of my knowledge, and that of my staff, no such materials have been prepared. The investigation is being conducted by the Pension and Welfare Benefits Administration, not by the Office of the Solicitor.

Senator METZENBAUM. That concludes this hearing. We stand adjourned.

[Whereupon, at 11:27 a.m., the committee was adjourned.]

○

63-114 (100)